

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-7096

UNITED STATES COURT OF APPEAL
SECOND CIRCUIT

PHILLIP DOUGLAS MILLER, ESQ.,
PLAINTIFF,

-AGAINST-

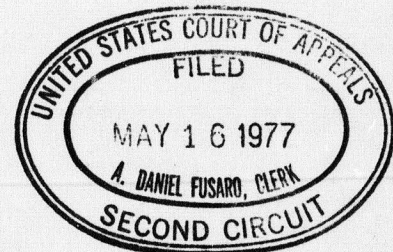
THE AMERICAN TELEPHONE & TELEGRAPH CO.
("AT&T"), JOHN DEBUTTS, ROBERT FLINT,
DONALD LAMONT, CYRUS HALPERN, RODERICK
AYA, MESSRS. CHRISTENSON, ANDERSON,
GAMMON, WORTHY, AND CERTAIN OTHER
UNNAMED EMPLOYEES OF AT&T,
DEFENDANTS

U.S. DISTRICT COURT DOCKET
NO. & CIV. 5462

U.S. COURT OF APPEALS (2ND CIRC.)
DOCKET NO. 77-7096

APPENDIX

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APPENDIX

PAGINATION AS IN ORIGINAL COPY

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UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK
CIVIL ACTION, FILE NUMBER

PHILLIP DOUGLAS MILLER, ESQ.,
PLAINTIFF,

-AGAINST-

COMPLAINT

THE AMERICAN TELEPHONE & TELEGRAPH COMPANY
("AT&T"), JOHN DEBUISS, ROBERT FLINT, DONALD:
LAMONT, CYRUS HALPERN, RODERICK AYA, MESSRS.:
CHRISTENSON, ANDERSON, WORTHY, AND CERTAIN
OTHER UNNAMED EMPLOYEES OF AT&T,
DEFENDANTS

ALLEGATION OF JURISDICTION

1. 42 U.S.C. 1981, wherein all persons in the United States are granted the same right to contract, to sue, and to the benefit of all laws to protect their person and property as are enjoyed by white citizens.
2. 42 U.S.C. 2000d, wherein all persons in the United States are granted the right to be protected from discrimination in any activity receiving financial assistance.
3. 42 U.S.C. 2000d-1, wherein the Federal Government may terminate any financial assistance it provides to any particular program upon a finding of noncompliance under 42 U.S.C. 2000d.
4. 42 U.S.C. 2000e-2(a)(1), wherein it is made illegal for an employer to discriminate based on race or color against an employee in his terms, conditions, or privileges of employment. Wherein it is also made illegal to limit, segregate, or classify an employee because of race or color, where the effect of such conduct will be to deprive an employee of employment opportunities or otherwise adversely affect his status.
5. 42 U.S.C. 2000e-3(a), wherein it is made illegal for an employer to discriminate against an employee for opposing an illegal employment practice.

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(2)

6. Executive Order No. 11,246, wherein any employer who has contracted with the Federal Government, and who discriminates based on race or color during the term of any such contract, is subject to the penalty of having the contract suspended or terminated, or having any other remedy appropriate to the particular situation imposed.

7. 41 Code of Federal Regulations Section 1. 12.803-1(a) wherein employers are required to act affirmatively to ensure that employees are not discriminated based upon race or color in employment, upgrading, transfer, termination, rates of pay, selection for training, and in other forms of compensation, and in the event of breach of this duty under the contract provision which requires such affirmative action, such contract or contracts shall be subject to cancellation, suspension, any remedy provided by law, the employer may be ineligible for future contracts, and the employer may be subject to any sanctions provided for by the Equal Employment Opportunity Commission.

8. 5th Amendment to the U.S. Constitution. wherein it was made the law of this country that no person shall be deprived of life, liberty, or property, without due process of law.

9. 13th Amendment to the U.S. Constitution, wherein it was made a law of this land that slavery and involuntary servitude shall not exist, and Congress was empowered to pass laws to enforce this law of the land.

10. 14th Amendment to the U.S. Constitution, wherein it was made a law of this land that no State shall deny due process of law or equal protection under the law to any person.

Accordingly, jurisdiction is based upon 28 U.S.C.1331(a) since the matter in controversy exceeds \$10,000.00, exclusive of interests and costs, and arises under the Constitution and the laws of the United States.

PENDENT JURISDICTION

In the interests of judicial economy, and on the basis that the federal questions over which this Court has original jurisdiction arise out of a common nucleus of operative facts, this Court has pendent jurisdiction over the following non-federal claims:

1. Executive Law of the State of New York, Section 296. 3-a(a) wherein discrimination based on age, between the ages of 18-65, is prohibited, with respect to promotion, compensation, and the terms, conditions, and privileges of employment.
2. The Administrative Code of the City of New York, Section Bl-7.0(6) wherein it is held illegal to aid, abet, incite, compel, or coerce the doing of any acts, or to attempt to do any of the acts, which are forbidden by this law of New York City prohibiting discrimination based on race or color. The applicable sections are substantially the same as those previously cited under federal law.
3. The following common law actions are also subject to the pendent jurisdiction of this Court:
 - a) Fraud and Deceit and Misrepresentation.
 - b) Breach of Contract.
 - c) Mental Distress.
 - d) Conversion of personal property.
 - e) Trespass.
 - f) Defamation.

WHEREFORE Plaintiff demands judgment against Defendants, and the following relief: 10% of the annual salary of each individual Defendant, including benefits; With respect to the Corporate Defendant, 25% of the annual salary of each Defendant, including benefits, plus \$100,000.00 for each employee involved in the acts of discrimination against Plaintiff, plus \$1 million against AT&T for each cause of action alleged, reinstatement, and back pay and the restoration of all lost benefits. In the alternative, a contract of retainer for legal services in an amount equal to the annual salary, including benefits, of Mr. Roderick Aya, plus back pay.

ALLEGATIONS OF COMPLAINT

DISCRIMINATION BASED ON RACE OR COLOR

a) IN HIRING

1. Plaintiff, a black male, a graduate of Columbia Law School, and licensed to practice as an Attorney in the State of New York, was offered a position with AT&T in November, 1975. I accepted the offer, and began to work at AT&T on January 12, 1976. I accepted the offer with the specific understanding, based on clear statements and representations made to me that:

a) My status and position would be that of Tax Attorney in the Comptroller's Dept. of AT&T;

b) My primary legal responsibilities were to be investment credit, depreciation, and cost accounting.

c) My salary to start was to be \$28,000.00, with annual increments of \$3,000.00.

d) That within 2-3 years Mr. Roderick H. Aya, Manager, Tax Research & Planning would be retiring, and that it was to fill this position when the time came that I was being hired.

e) My benefits would include: medical and dental benefits; a stock purchase plan; an incentive savings plan; 3 weeks vacation; a bonus of 10% based on performance; low cost life insurance, and other benefits.

2. These representations were made by Mr. Cyrus J. Halpern, Director, Federal Taxes, and Mr. Roderick H. Aya, Manager, Tax Research & Planning in November, 1976, prior to my acceptance of the position, in response to specific questions I asked. The above representations were so erroneous and misleading as to the real nature of the job that it is impossible to conceive that these men were not lying wilfully, intentionally, and knowingly. The statements were fraudulent. I assert fraud, deceit, and misrepresentation based on the following:

a) There is no position of Tax Attorney in the Comptroller's Dept.

b) I was never given any responsibility of any significance in Investment Credit and Depreciation. I did nothing at all with respect to cost accounting. This falsehood was the worst of all since I came to AT&T for the work experience. A white, female, Ms. Barbara Josefowicz, an Attorney, was hired approximately 4 months after me, and her job description stated that she had responsibility in the Investment Credit and Depreciation areas. This job description was prepared by Mr. Aya. This outline or job description of the duties of the persons under Mr. Aya, also listed my duties. Nothing whatever was stated in my job description with respect to Investment Credit or Depreciation. Instead there were a number of accounting duties, and I am not an Accountant. As stated below, in greater detail, I confronted my superiors with this and other facts. I read the above job description in mid-April, and within a day I made the decision to speak to my superiors about my job situation.

c) Although the work I did was legal in nature, I was denied the status of, and prevented from functioning as, an Attorney:

i) I was directed not to make any contact with the Internal Revenue Service.

ii) I was told I had no power to write a legal opinion.

iii) I was told that because I worked in the Comptroller's Dept. I was an "Accountant", although the statement itself is ridiculous. My background and experience is that of a Lawyer, and this is indisputable.

iv) Although I had been informed of a separate Legal Dept., I had not been informed of a separate Tax Legal Dept. On my first day, January 12, 1976, when I was taken to meet them, I discovered their existence. The offices in Tax Legal were large and spacious. I was then taken to my office, which was small, with metal furniture, and had no door. As Mr. Halpern left me in my new office, he said words to the effect: "I hope you stay the day."

v) I was told on January 12, 1976 that I would attend a meeting with an Attorney from California, Pete Loomy, in the next few days. I never attended the meeting. I was informed by Mr. Halpern and Mr. Aya that Tax Legal felt my presence was unnecessary.

d) I was told I was not going to get annual increments of \$3000.00; that there was a rating system, and only the highest rated received this increment. I was with AT&T for about 4 months before I discovered the existence of this rating system.

e) I was never told that certain of the benefits promised me did not accrue until after 6 months of employment, and others until after a year of employment. Other benefits, I discovered, I was not entitled to at all.

f) Mr. Aya is not due to retire for another 5½ years.

g) AT&T's own rules require that an employee that is new be given a job description. I was never given one. First, I never knew I was entitled to one, and when I discovered that I was, I was refused despite repeated requests.

h) AT&T's own rules require that new employees be informed of the evaluation process. I was never told about it by my superiors until after I discovered its existence through conversations with other employees, and an EEO booklet which was distributed in mid-March, and which I never got around to reading until the problems I was having with my job were becoming unbearable.

3. It is clear that AT&T consciously and wilfully misled me into taking this job with them. Their sole purpose was to fraudulently induce me to take a job they needed to be filled by a black person for the purpose of satisfying their quota under their Affirmative Action Plan ("AAP") which they established pursuant to a Consent Decree they entered into with the Government.

b) IN TERMS AND CONDITIONS OF EMPLOYMENT

1. The allegations previously stated with respect to Heading "a" HIRING, are also applicable here.

2. My academic and professional experience qualifies me as an Attorney. I was hired with the understanding that my duties were to be that of a Tax Attorney. I did not have either the status or the duties of an Attorney, as previously stated.
3. There was discrimination in the terms and conditions under which I was employed when compared to the terms and conditions of employment of white Attorneys employed by AT&T.
4. I was given bad assignments. I was kept away from good work. I was given needless and unnecessary assignments. I was forced to work on matters long after it became necessary.
5. I was insulted and abused by my superiors in the presence and hearing of other employees.

c) IN CLASSIFICATION AND STATUS

1. The allegations previously stated with respect to duties and job status are also applicable here.
2. Based on the above, it is clear that although I was hired as a Tax Attorney, I was subjected to a classification which limited my employment and adversely affected my employment status.

d) RETALIATION

1. In mid-April, after Ms. Josefowicz was hired and I read where she had received duties I was hired to do, I spoke to my superiors for the first time about my problems. Mr. Aya appeared very surprised that I wanted to discuss my job with him. Before I said a word, he made it clear to me that he had no problems with my work, describing it as "A-1" and saying that he had no complaints whatsoever. I then stated that Ms. Josefowicz had been hired after me, yet she had received my duties. Mr. Aya strenuously sought to dismiss the matter. I then spoke to Mr. Halpern, who agreed that I had been hired to handle these matters. He also agreed that he would see to it that I would be given work in these areas. What I received instead was

retaliation. I had never received a single negative comment about my job, prior to the above discussions. In fact, the first task I completed for Mr. Ava received the following compliment: that it was one of the finest analyses he had ever read. However, within days after my discussion about my job situation, Mr. Halpern came into my office to tell me that people in the operating companies of AT&T were complaining about my attitude. Mr. Halpern could not say who had said so, when they had said so, what they had said other than to say my "attitude", or why they had said so. He could not even identify which operating company it was the alleged complaints came from. The instances of retaliation are simply too numerous to mention. Suffice to say that not a week went by after this period of time without some new set of incidents which had the effect of making me miserable on this job. Because of the problems I was experiencing, I eventually prepared a Statement dated July 1, 1976, describing the essence of what I was going through during that time. The Statement was submitted to my superiors, with little result. They suggested that either I transfer to Tax Legal, take another job within the Comptroller's Dept., to Tax Legal accept the job I was in, or quit. I refused to transfer ^{of my own initiative} because it was their duty to take some affirmative step to rectify the wrong, which they completely refused to do. I refused a transfer within the Comptroller's Dept. because this was in fact no option at all, since I would have the same problem with duties, assignments, and superiors. I refused to quit because I intended to stay and fight this matter to the bitter end, and I felt that if I quit, it would make it easier for them to continue their rotten practices as well as minimize their liability for their wrongdoing. I then informed AT&T that if the matter could not be resolved amicably then I intended to pursue legal redress; a course of action I had made clear I would pursue if the matter could not be resolved in a way I considered fair. On September 1, 1976, I sent a letter to the Chairman of the Board of AT&T, John DeButts, which was never answered. On September 7, 1976, I sent a letter to Mr. Ava

requesting absence with pay for personal reasons, pursuant to AT&T's own rules.

Two days later, on September 9, 1976, I was fired.

e) WRONGFUL DISCHARGE

In a letter to me Mr. Aya stated that the reasons for dismissing me was my attitude and performance. When I read it in his presence, I said that do you know that this is defamatory? His response was to say: "I know. I know. It was meant for you." The letter is replete with falsehoods. The real reason for my discharge was because I refused to ignore their continuing acts of discrimination against me. The discharge violated the Company's own rules. I spoke to the Vice-President and Comptroller of AT&T, Robert Flint, about the decision to fire me. In substance, from that conversation I am convinced that at least in his mind I was fired because AT&T found it unacceptable to have an employee on the payroll that was going to sue the Company. At the time I was fired, and I was requesting leave of absence with pay, I had approximately two weeks of vacation due me. One of the reasons given for firing me was my "repeated" absences. It is impossible for an employee to work for a Company for 8 months, be entitled to 3 weeks vacation, and have as much vacation as I had left over, and be absent repeatedly.

f) VIOLATION OF SECTION 296.3a(a) OF THE EXECUTIVE LAW OF THE STATE OF NEW YORK.

1. I was 25 years old during the time I worked for AT&T. I was the youngest person on my level in that Company. Mr. Halpern made repeated references to me as a "kid." John Meyerhoffer, within the first week I was at AT&T, an employee in Treasury, made a loud comment near my office. In loudly criticizing a recent decision to place a younger person in a job held for many years by an older person, he said "so much for EEO."
2. Although I had been told that I was being hired to replace Mr. Aya when he retired, at the time I was hired, Mr. Halpern subsequently stated that I was too young and lacked the experience for the job. This is false. I graduated from law school at 22.

I have a Master's Degree in English, I worked for the law firm of Dewey, Ballantine, Bushby, Palmer & Wood from 1973-1975. My legal background is at least as good, if not better, than the persons in the Tax Legal Dept. Additionally, my credentials are unquestionably greater than the majority of persons on my former level in the Comptroller's Dept., all of whom, with the exception of 2 to my knowledge, had no legal training, although they did legal work.

3. I distinctly perceived that a part of my problem at AT&T has not only been my color, but my age and apparent youth. I feel that there is resentment at AT&T for blacks, period. There is additional basis for resentment where the black person clearly evidences ability, and has youth in his favor.

g) VIOLATION OF SECTION B1-7.0(6) OF THE ADMINISTRATIVE CODE OF THE CITY OF NEW YORK.

1. Messrs. Halpern and Aya were the most actively involved in the acts of discrimination and illegality. Their superior Mr. Donald I. Lamont knew or should have known of the events that took place. In fact, he was specifically responsible for the decision to deny me access to a key to the Corporate Library, and a card to the New York Law Institute. Mr. Flint, as Mr. Lamont's superior, also had the same duty of responsibility with respect to this matter.

2. Mr. DeButts was made aware of the situation by my letter of September 1, 1976. To the extent that his subordinates were engaged in these illegal acts, and he failed to exercise any control over them he too is liable for such improper conduct.

3. The EEO officers of AT&T, and those who supervised them, were integrally involved in this matter, after I had submitted my statement. They wanted me to drop the matter or quit. Despite the obvious wrongdoing of AT&T they had no power to protect my rights although this was their legal duty. Instead of seeking a fair resolution of the matter, they sought to pressure me. Ms. Bea Worthy although apparently sincere, told me that "AT&T bribes Judges" in an apparent attempt to

scare me away from pursuing my rights against AT&T. Mr. Ed Anderson, her superior, was totally ineffective. I heard him speaking to someone over the phone, saying, "but at least he should get a job description." Needless to say, I never got one. When he saw he could not convince me to drop the matter, he tried to find fault with my conduct at every turn. He even asked me why I never mentioned that Mr. Aya had a speech defect. Maybe the Court can find some relevance to this fact. I can not. He took me out to dinner to discuss the matter. I repeat again, the more he saw how serious I was, the more antagonistic he became. The fact is, they are paid by AT&T and given little power. They are in no position to resolve matters where the Company is at fault. They are completely unable to fulfill their legal duties. The very existence of such people on the payroll evidences discrimination where their power does not go beyond trying to persuade an employee, through threats if necessary, to forget whatever wrong the employee has experienced.

h) Fraud, Deceit, and Misrepresentation

1. The allegations contained in Paragraphs "a"-"g" support this cause of action.

i) Breach of Contract

1. The allegations in Paragraph "a" support this cause of action. It is without question that an oral agreement existed between myself and AT&T. In addition, I am a third party beneficiary to each contract between AT&T and the United States Government in which there exists a payment to AT&T in the form of capital contributions.

j) Mental Distress

1. The allegations in Paragraphs "a"-"g" support this cause of action. No one can dispute the mental suffering that an employee experiences when he faces problems with his employers who represent his career and livelihood and standing in his community. The suffering I felt was tremendous. I had 2 other offers of employment:

one, with American Express, and the other with the NAACP Legal Defense Fund. I had not the slightest intention of leaving AT&T. This decision to work with AT&T represented a career decision for me. The psychological injury caused by AT&T and its employees were extremely painful and severe. I know that some people attempt to dismiss this type of claim of injury as minor. It is not. It is one of the worst possible ways of injuring a human being. This cause of action represents to me one of the central methods of race discrimination. The very first meeting that I attended while working for AT&T was at New York Telephone Company's offices in Manhattan. As I entered the room, one of the persons already present said: "They let all kinds into these meetings nowadays don't they." No one in the room said a word. There was no possible way to explain those words except to say they were consciously directed at the sole black person in that room. One week before I requested absence with pay for personal reasons, John Meyerhoffer said the following to a person he was speaking to over the telephone who had recently been promoted: "Get your shotgun out. It's open season on black, female Jews." Immediately after that statement, Edward Dudley, Mr. Meyerhoffer's superior, walked slowly by my office. I know Ed Dudley. He said nothing to me as he walked by. He said nothing because he had heard the statement, he knew intimately what I had been experiencing, and he wanted to see if I was in my office to hear the statement that Mr. Meyerhoffer had made. He walked by my office without saying a word, and he generally says hello. In one form or another, there were too many instances of being made uncomfortable and made to feel out of place for me to explain them, as any honest person would readily admit, as being caused by nothing other than race and color. After all, the only reason I got the job was because they had a quota to fill. None of their conduct towards me is surprising if this fact is kept in mind.

k) CONVERSION OF PERSONAL PROPERTY

1. After I was fired, I went to AT&T to pick up my belongings. My files had been rifled. My files on the matter of capital contributions were completely missing and Mr. Aya, and the persons with him, including 2 security guards, refused to return those files saying they were Company property. It is incredible for me to believe that my work, no matter who it was done for, and no matter what I was paid for it, belongs solely to my employer and I have no rights to it whatsoever. The work I did belongs as much to me as it does to AT&T, especially under these circumstances.

This refusal to return my property is another example of their retaliatory conduct.

2. After I was fired, I was sent a check which deducted withholding taxes. I had previously submitted a form which prevented any withholding since my tax liability had been completely paid for already in taxes already withheld. Nonetheless, despite my written instructions, in excess of \$400.00 was kept from me. This is a substantial amount of money when someone has lost his job.

TRESPASS

1) My desk was entered into on numerous occasions, subsequent to the time I complained about my job situation. I submit that no one, not even an employer has the right to enter an employee's locked desk without permission.

m) DEFAMATION

1. The fact that I was fired of itself was damaging to my reputation and career at AT&T. To all who know me, it became something to explain. There is no question that if the facts I have alleged are true, that AT&T has sought to damage my reputation in a most severe way.

2. I interviewed with one Company after being fired. After they were told I had been fired, they were no longer interested. They gave other reasons, of course, but they were very interested before they were told, and very little interested after they were told.

n) DEPRIVATION OF DUE PROCESS

I was fired by AT&T without any opportunity to be heard by an impartial body as to the validity or truthfulness of the reasons given by them for firing me. Such reasons were: attitude and performance. In fact, the only reason I was fired, other than the fact that they resented the presence of a 25 year old, and the only reason for the previous months AT&T created a situation which they hoped would be so intolerable that I would be forced to quit, was because I refused to accept their utterly outrageous acts of discrimination against me. The Company went so far as to fail to follow its own guidelines and policies in firing me.

o) DENIAL OF EQUAL PROTECTION

Upon information and belief, AT&T has not fired white employees for requesting absence with pay for personal reasons; nor discriminated against white employees in job status, position, or assignments, or other terms and conditions of employment. Nor has AT&T fraudulently induced white employees to accept employment under false pretenses.

SPECIAL DAMAGES

1. Defamation. With respect to this cause of action, my reputation and business and career has been damaged.
2. Injunctive relief. AT&T was my primary means of income. This was entirely cut off when they fired me. If AT&T were required to reinstate me, or to contract with me for legal services, I would not face the possibility of bankruptcy. It goes without question that the injury to me from AT&T's acts is far greater than anything I could possibly do to them. Such relief as requiring that AT&T contract with me would preserve the status quo during the pendency of the action. The law can provide no adequate remedy if I will not be around to recover any damages from AT&T for their injuries to me, when the final decision in this case comes around. If this form of relief is denied me, AT&T will have benefitted from their illegality without regard

to the ultimate outcome in this case. The effect of such injunctive relief on AT&T would be insignificant. It would harm them in no way, and it would prevent me from further harm. AT&T fired me, and gave me 3 weeks to find another job. This was an impossible condition. No one with my qualifications, and resulting salary level can reasonably expect to find another satisfactory position within 3 weeks. This is unconscionable. AT&T should not be allowed to deny me a livelihood. To allow them to do this is tantamount to allowing AT&T to win this matter by the mere act of firing me and placing me in this position. If AT&T can hire me, AT&T can contract with me. This represents money spent for services rendered.

3. It is well settled that welfare recipients are entitled to a hearing before their benefits are cut off. It is therefore impossible to justify cutting off an employee from his livelihood without the same rights being provided an employee as is provided recipients of welfare. It is also well settled that an employer can enjoin an employee from divulging confidential information that will produce substantial financial loss to the employer. Even a photographer may be enjoined from taking pictures of a public figure. This being the law, it would be a travesty of justice if an employer may fire a black employee under these circumstances, and subject a black person to acts as have been alleged herein, without any remedy in equity to fill in the gaps in the existing legal remedies in order to preserve the status quo, and ensure that during the pendency of this action Plaintiff is not made to continue in a state of acute financial instability, where such injury was directly the result of the illegal acts of AT&T and its employees.

Dated: December 8, 1976.

[Signature]
Complainant

COUNTY OF

Attorney admitted to practice in the State of New York

certifies that the foregoing
has been compared

to be a true and complete copy.

deponent is

the attorney(s) of record for

in the within action; deponent has read the foregoing

and knows the contents thereof; the same is

true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The deponent swears that the foregoing statements are true, under the penalties of perjury.

Sworn to before me on

The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF NEW YORK

the PLAINTIFF

the foregoing
deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

being duly sworn, deposes and says: deponent is
in the within action; deponent has read
and knows the contents thereof; the same is true to
information and belief, and as

the
of
corporation.

the foregoing
is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because

in the within action; deponent has read the
and knows the contents thereof; and the same
to be alleged upon information and
is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on

19

PHILIP DOUGLAS MEYER, ESQ.

STATE OF NEW YORK, COUNTY OF

being duly sworn, deposes and says: deponent is not a party to the action.

is over 18 years of age and resides at

19

deponent served the within

On
upon
Attorney(s) for

in the action at

the address designated by said attorney(s) for that purpose
by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in a post office official
depository under the exclusive care and custody of the United States Postal Service within the State of New York.

On

19

deponent served the

upon

person so served to be the person mentioned and described in said papers as the
personally. Deponent knew the
therein.

Sworn to before me on

19

The name signed must be printed beneath

②
#9
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT

MILLER

VS.

AT&T, ET AL

AMENDMENTS TO PLAINTIFF'S
COMPLAINT AS OF RIGHT UNDER
FRCP 15(a)

FILE NO. 76 CIV. 5462 KTD

1. Plaintiff's Complaint is amended as of right as follows.
2. Page 14, et seq., of Plaintiff's Complaint is hereby amended to include the following legal claims, to clarify the factual allegations upon which they are based, and to appropriately identify the Defendants alleged to have violated such legal claims.
3. The following Paragraphs are added to Plaintiff's Complaint to include the following additional violations of law:
 - 3.1) Paragraph n) Violation of First Amendment. Interference with freedom of speech, and the right to petition the Government for redress of grievances.
Allegations in Paragraphs b,d,e, and g of my Complaint support this legal claim.
 - 3.2) Paragraph o) Violation of Fifth Amendment. (Former Paragraph n is now Paragraph o). There is added a final sentence: "This constituted a violation of my rights to due process under the law."
Allegations in Paragraphs b.3,d,e,g,i(as amended),and k of my Complaint support this legal claim.

3.3) Paragraph p) Violation of Ninth Amendment. Interference with the unenumerated rights retained by the people.

Allegations in Paragraphs a-m of my Complaint support this legal claim.

3.4) Paragraph q) Violation of Tenth Amendment. Interference with rights reserved to the people.

Allegations in Paragraphs a-m support this legal claim.

3.5) Paragraph r) Violation of Thirteenth Amendment. Involuntary servitude is unconstitutional. It is well settled that this refers to all the badges and incidents of slavery. This is the constitutional basis, inter alia, for the Civil Rights statutes.

Allegations in Paragraphs a-e, g, i,j,k and m support this legal claim.

3.6) Paragraph s) Violation of Fourteenth Amendment. Violation of the privileges and immunities clause, the due process clause, and the equal protection clause.

The allegations in Paragraphs a-g, i,j,k, and m support this legal claim. In addition, new Paragraph o. (Old Paragraph o is now Paragraph r).

3.7) Paragraph t) Violation of 42 U.S.C. 1981. Interference with right of black people to contract with the same rights as white people.

Allegations in Paragraphs a-e, and g-s support this legal claim.

3.8) Paragraph u) Violation of 42 U.S.C. 1982. Interference with right of U.S. citizen to hold personal property.

The allegations in Paragraphs b-e, g,k, and s support this legal claim.

3.9) Paragraph v) Violation of 42 U.S.C. 1985(2) and(3) prohibiting conspiracy by two or more persons to violate a persons rights under the law, and creating the right to sue for damages against such persons individually.

The allegations in Paragraphs a-e,i,j,k, and n-t support this legal claim.

3.10) Paragraph w) Violations of Sections 292.1, 296.1(a)and(e), and 297.9 of the Executive Law of the State of New York.

These laws of New York State prohibit racial discrimination, and any Court of appropriate jurisdiction may hear such claims.

The allegations in Paragraphs a-e, g, i, j, k, n-t support this legal claim.

3.11) Paragraph x) Violations of Sections B1-7.0, and 343-8.0 of the Administrative Code of the City of New York. Wherein any manufacturer, seller, or distributor of equipment or supplies to the City of New York has materially breached its contract terms if it fires any employee because of race.

The allegations in Paragraphs d,e,i, and o support this legal claim.

I am a third party beneficiary to such contracts.

3.12) Paragraph "i" is amended to include the following sentence:

"The terms of AT&T's Consent Decrees and its Affirmative Action Plan pursuant thereto, are material terms of my contract of employment with AT&T."

3.13) Under the heading "Special Damages" Paragraph 4 is added, relating to Punitive Damages. Punitive damages is alleged because of Defendants wilful, bad faith violations of the laws against discrimination.

4. The above legal claims, identified alphabetically, apply to each of the Defendants as specified below:

4.1) Paragraphs a-c, and h.

Donald Lamont. Cyrus Halpern. Roderick Ava. Certain unnamed employees of AT&T. AT&T.

4.2) Paragraphs d,g,i-j, and m-x.

All named, and unnamed Defendants.

4.3) Paragraph e.

John DeButts. Robert Flint. Donald Lamont. Cyrus Halpern. Roderick Ava. Messrs. Christenson and Gammon. Certain other unnamed Defendants. AT&T.

4.4) Paragraph f.

Cyrus Halpern. AT&T.

4.5) Paragraphs k-l.

Roderick Ava. Certain unnamed Defendants. AT&T.

5. The Complaint, as amended, is not clearly numbered. It creates some difficulty in reviewing. For this reason, a single Complaint which uses numbers instead of letters, and incorporates the changes made, will be submitted shortly. Because of time pressures, it will not be completed prior to this Court's hearing the Motions already before it.

6. I request that this Court seriously consider every legal claim alleged. These laws are not cited frivolously. They are cited because they exist on the books and in my professional judgment as an Attorney they apply to the facts of this case. Their multiplicity, and

repetitiveness, are not faults that can fairly be attributed to the lawyer who cites them. Their multiplicity makes it clear that there remains a continued need to reinforce, and enforce, the well settled law of the land against discrimination. It also makes it clear that legislators have gone to great lengths to apply the law of the land to all of the people. To be effectuated, Judges must, at the insistence of injured parties, recognize the existence of these laws and their reason for existing, and then exercise their constitutional duty to enforce these laws.

Respectfully submitted

5/
Philip Douglas Miller, Esq.

Dated: January 17, 1976.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT
PRESENT
HON. _____

JUSTICE:

MILLER

VS.

AT&T, ET AL

ORDER

Upon reading and filing the annexed affidavit of Phillip Douglas Miller, Esq., sworn to the ____ day of December, 1976, it is

ORDERED that Plaintiff is authorized to have a person of his choosing that is legally authorized to serve process, serve a summons and complaint upon the individual Defendants as provided in this Order.

IT IS FURTHER ORDERED that the individual Defendants shall be served as follows.

The Defendant Corporation, AT&T, through any person authorized to receive service of process on behalf of AT&T, shall receive the Summons and Complaint for each individual employee or officer of AT&T that is a Defendant in this action, and shall then have an employee unrelated to this action personally serve each individual Defendant, and service shall be complete upon leaving such papers required to be served, along with a copy of this Order, upon such person authorized to receive service of process on behalf of AT&T.

Enter

5/
JFC

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT

MILLER

VS.

AT&T, ET AL

AFFIDAVIT IN SUPPORT OF ORDER

Plaintiff, Phillip Douglas Miller, Tex., being duly sworn, deposes and says:

1. That granting Plaintiff the right to allow service to be made by a person designated by Plaintiff that is not a U.S. Marshall, who is over 21 and not a party to this action, and is legally authorized to serve process, will save time and save the travel fees that would otherwise be incurred if a U.S. Marshall were to serve the required papers.
2. Plaintiff also requests that service be made on the individual Defendants in this action by appointing any agent authorized to accept service of process on behalf of AT&T, as agent authorized to accept process for each individual Defendant, and require such person to have an employee of AT&T unrelated to this action serve a copy of the Summons and Complaint on each employee or officer of AT&T personally. Plaintiff respectfully requests that this Court authorize this method of service since all the individual Defendants are either officers or employees, or both, of AT&T, and Plaintiff has no way of knowing the residence address of any of the individual Defendants. Personal service on the individual Defendants would be greatly simplified by this procedure, and would serve to avoid unnecessary hardship and difficulty in serving the necessary papers.
3. Plaintiff submits that the above procedure is consistent with FRCP 1 which states that the federal rules shall be " construed to secure the just, speedy, and inexpensive determination of every action." This method will ensure full and adequate notice of this action to the Defendants in the simplest and speediest manner.

4. The names of certain Defendants are as yet unknown. As the names are disclosed, the same procedure for these persons would be used.

Dated: December 8, 1976.

Phillip Douglas Miller, Esq.

Sworn to before me on

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STATE OF NEW YORK, COUNTY OF ...

is over 18 years of age and resides at

On deponent served the within

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-25

herein, by delivering one copy thereof to [redacted] personally. Deponent knew the person so served to be the person mentioned as being called in said report as the [redacted] therein.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MILLER

VS.

AT&T, ET AL

ORDER TO SHOW CAUSE FOR
PRELIMINARY INJUNCTION
FILE NO. 76 CIV. 5462 (KTD)

Upon reading and filing the annexed affidavit of Phillip D. Miller, Esq. sworn to the 27th day of December, 1976, and on all other papers had herein, let the Defendant, AT&T, and all other employees of AT&T who are also Defendants in this action, show cause before the United States District Court of the Southern District of New York, (COURTROOM 36) at the Courthouse located at Foley Square, in the County, City, and State of New York, on the 12th of ~~JANUARY~~, 1977 at 10:15 in the FOREnoon of that day, or as soon thereafter as counsel can be heard, FOR AN ORDER PERS. TO FRCP 65(a) why Plaintiff should not be immediately reinstated as an employee of AT&T, and upon such reinstatement be transferred into the Legal Tax Dept. of AT&T, or, in the alternative, if reinstatement appears unacceptable to Plaintiff or this Court because of the substantial likelihood of continued retaliation and discrimination against Plaintiff if he were to return as an employee, let the Defendants show cause why AT&T should not contract with Plaintiff ^{for} legal tax advice to AT&T at a rate of pay no less than Plaintiff's former salary including benefits, and immediately restore to Plaintiff all back pay and benefits deprived Plaintiff because of Defendants' unlawful conduct, and it is further ordered that ~~pending the hearing on this motion, and resolution of any legal or factual dispute material to this action, the Defendants shall restore Plaintiff to its payroll, and to all benefits enjoyed by Plaintiff~~

~~prior to his unlawful dismissal and shall make work available to him on return for the compensation he shall receive.~~

✓ Sufficient reason appearing therefor, let service of a copy of this Order, and accompanying papers, ~~be served~~ ^{OR THEIR ATTORNEYS} upon the Defendants in like manner to service of the summons and complaint in this action, by 5 P.M., January 7th 1977, be deemed sufficient service.

DATED: NEW YORK, N.Y.
JANUARY 6, 1977
ISSUED:

Russ L. Carter
U.S.D.J. ER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PRESENT:

HON. DUFFY JUSTICE :

MILLER :

VS. :

AT&T, ET AL :

Affirmation
AFFIDAVIT IN SUPPORT OF ORDER TO
SHOW CAUSE

FILE NO. 76 CIV. 5462

Phillip D. Miller, Esq., affirms the following under penalties of perjury:

1. I was fired by AT&T because of racial discrimination, and retaliation because of my specific requests to my superiors that they correct their illegal conduct. They say it was because of my attitude and performance. I was fired in the 8th month of my employment with AT&T, and was given 3 weeks to find another job. I found it impossible to find a job in that short period of time, and went directly into the private practice of law.
2. I started working for AT&T on January 12, 1976. Mr. Aya, and MR. Cyrus J. Halpern, Director, Federal Taxes, represented to me that: 1) my status and position was Tax Attorney in the Comptroller's Dept., 2) my areas of responsibility were: a) investment credit; b) depreciation; and c) cost accounting; 3) my salary was \$28,000, with annual increments of \$3,000 minimum for the next 2-3 years, including a variety of fringe benefits it turned out I was not entitled to. With the exception of my annual salary, all these representations turned out to be false. My reaction to all of this was bitter disappointment. I thought I had made a career decision and when I felt it turn sour I literally felt sick. Instead of quitting, which in hindsight may have been the correct thing, I resolved to make the most out of the decision I had made, by staying there for the experience, at least.

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3. The rotten job I had chosen was apparent to me from the first day. I had 2 other offers when I accepted AT&T's offer. I could not accept that I had made such a bad choice. I revealed nothing about my feelings until mid-April, 1976. In mid-April, AT&T hired Ms. Barbara Josefowicz, who was introduced to me as a Tax Attorney, and I saw in writing that she was given responsibilities in the areas of investment credit and depreciation, and that my job assignments excluded these matters entirely. That was the camel that broke the camel's back. It was then that I asked to speak to my superiors about my job situation. I had accepted things for 4 months by that time, wordlessly.

4. Moments before I sat down for the first time to discuss my job, Mr. Aya said to me that he had no problems whatsoever with me, that he was perfectly satisfied with my work, and that my work was "A-1". Previously, Mr. Aya had said to me, after I had completed my first assignment, that it was one of the finest analyses he had ever read. The fact is, no one had made even the slightest criticism of my work prior to the time I raised questions about my job. The reasons given for firing me, namely attitude and performance, were totally false and baseless. In fact, when I read the letter Mr. Aya had written firing me, in his presence, I said to him: "Do you know that this is defamatory?" Do you know what his response was? He actually said: "I know. I know." Then he said the letter was only meant for me!

4. My first conversations with my superiors about my job centered around the kind of experience I was getting. As previously mentioned, they had hired a white, female, tax attorney after me, and had given her duties that had been promised me. Duties which were central to my decision to come to AT&T, and central to my decision to stay at AT&T after I had come there. MR. Aya was extremely defensive at this

discussion. He had no intention of resolving the matter. I then spoke to Mr. Halpern. The result appeared to be positive at the time. Mr. Halpern conceded that I had been hired to work in the above described areas, and he agreed to see that I would be working in those areas from then on. I was completely mistaken. A few days later, Mr. Halpern came into my office telling me that someone in an operating company did not like my attitude. He would not say who, he would not say what was said, he would not say which company was involved. Mr. Halpern was lying. Of the more than 80 people I had talked to up to that point in time, not a single person had given the slightest hint of displeasure with my "attitude." Everybody knows by now that this is a term most commonly used in a disagreement involving blacks: to wit, a hand on the hip and a comment 'I don't like your attitude.' Mr. Halpern made these remarks so that all the people who worked in my vicinity were able to hear.

5. Three months more went by, and I still received no work in the previously mentioned areas. In fact, I was given useless and meaningless work. I was forced to remain on assignments long after it was necessary. I was even put on a project after it had been pronounced dead. This led to my requesting further discussions with my superiors. For some reason, I actually felt that if I openly discussed my experiences with them they would be responsive. I actually believed they would show good faith. Without further detail, matters got worse, not better. In fact, in one conversation I said to Mr. Aya that if I ever spoke to a subordinate the way he had spoken to me, I would fire that person; I actually asked him why should I be put through these experiences, why not simply fire me? This conversation took place in June, 1976. On the same day, I read AT&T's Affirmative Action Plan Booklet for the first time. The Booklet had been distributed some time in March

but I had not bothered to read it. What was not important in March, became very important in June. After I read the Booklet, I was extremely upset. I finally realized that I had a job that satisfied a government quota for minorities; with that understanding, my treatment was perfectly consistent. They were forced to hire me, but they had no commitment, despite their Booklet, to give me a future or responsibility. I would add that when they saw that I wanted good work, and I worked hard, they did not want me around. Blacks are bad enough, but blacks with ambition and ability, are intolerable and don't belong. The Booklet told me that I had a right to a job description from my first day on the job, and I was to be informed, among other things, of AT&T's job evaluation program. This was not done. I also read of my right to discuss my job with my superiors. I had done this, but I was made to suffer for it. The situation was so bad that, pursuant to the Booklet, I prepared a written Statement and submitted it to my superiors in July, 1976. This did not resolve matters in the least. Their conduct became unbearable. I was being pressured into quitting. In fact, they went so far as to have 2 employment agencies call me up. There is not the slightest doubt that AT&T had these Agencies call me. One firm said they were returning my call, which was a barefaced lie. The other firm admitted someone had referred them, but said they were not permitted to disclose who had done so.

6. After being fired, I contacted a number of employment agencies. I interviewed with Bristol-Myers, Inc. They lost interest when they were informed by me that I was fired by AT&T. Subsequently, 2 Agencies informed me that Bristol-Myers was specifically looking to fill a minority position. Mr. James Gord, Esq., International Tax Counsel for Bristol Myers, later informed me that a white, female attorney was hired instead of me, because her background was heavier in International

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Taxation. Mr. Gord, however, came from a law firm where he worked primarily on Pension and Profit Sharing Plans.

7. Bristol-Myers is typical. It is impossible for me to find a job, being black, and having been fired from AT&T because I complained about racial discrimination. What makes it so, is that the major employers literally have their "black spot", as did AT&T, where I was the only black on my level. One of the Employment Agencies that had called me before I was fired, when I contacted them after I was fired, wanted to refer me immediately to Bristol-Myers. This was the easiest of interviews until I said AT&T had fired me, and I described the circumstances. To be reasonably acceptable to another employer this illegal firing has to be resolved in the first instance. The irreparable injury is obvious. I have no job, my financial resources and my credit is exhausted. I am in a position to declare bankruptcy right now. Other employment is precluded because of the stigma of having been fired for these reasons. In order for me to even be around at the end of this case, I must have money. The status quo prior to my being fired should be preserved in some way. I should be reinstated as a Tax Attorney in the Legal Dept., or they should contract with me for legal services. AT&T hired me and paid me for my work before. They can still do so while this matter is before the Court. If this is not done, I will suffer although AT&T is the wrongdoer. AT&T will be allowed to benefit from their illegal conduct, which included firing me because I stated I would sue AT&T if they did not stop their particular acts of discrimination against me.

Respectfully submitted,

Dated: December 27, 1976.

Phillip D. Miller
Phillip D. Miller, Esq.

8. Relief is being requested by Order to Show Cause because of the urgent necessity to obtain injunctive relief in order to avoid the irreparable injury as previously described. That would otherwise result.

9. No previous application for this relief has been made.

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#5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PRESENT:

HON. J. DUFFY

MILLER

VS.

AT&T

MEMORANDUM OF LAW IN SUPPORT
OF ORDER TO SHOW CAUSE

FILE NO. 76 CIV. 5462

The following is in the form of a memorandum of law in the interests of form, however, because of the need to submit this information promptly, and the short library hours in the holiday season, some citations in this memorandum are incomplete, although they will serve the purpose.

1. 42 U.S.C. 1981 is a separate, independent basis of Federal Court jurisdiction. The following authority support this proposition of law:

1.1) Young v. ITT 438 F.2d 757 (3rd Cir., 1971). There, the Court ruled, inter alia, that 42 U.S.C. 1981 is not superseded by 42 U.S.C. 2000e. Citing Jones v. Alfred Mayer 392 U.S. 409, the Court also ruled that Section 1981 was intended to cover private acts of discrimination. This holding has recently been reaffirmed by the Supreme Court in Runyon v. McCrary 96 S.Ct. 2586 (1976), at pp.2594-96.

Young also held that Section 1981 covers employment contracts. I have alleged that a binding oral contract of employment existed between myself and AT&T. This fact is of especial relevance in considering the appropriate relief, discussed infra.

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1.2) Sanders v. Dobbs House 431 F. 2d 1097 (5th Cir., 1970). There, the Court ruled that Title VII remedies are not intended to preempt Section 1981's general remedial language.

1.3) Tramble v. Converters Ink Co. 343 F.S. 1350 (D.Ct., Ill., 1972). There, the Court ruled, inter alia, that a Plaintiff need not sue under Title VII in order to sue under Section 1981, and that where a suit is brought under the laws of the United States, a federal court obtains jurisdiction over the subject matter, unless the suit is insubstantial or frivolous. Based upon the facts alleged in the Complaint, there is no question that the issues involved in this case are substantial and in no way frivolous. Specifically, the central issue in this case is whether an employer may ^{representations to} ~~mislead and misrepresent to~~ a minority candidate ^{make} ~~in order~~ to induce the employee to take a job which fulfills the employer's quota under a federally imposed hiring plan, ^{may} ~~and~~ thereafter ^{he} ~~disregard~~ ^{ed. Also, whether the employer might not disregard but also} the representations made ^{and} ~~and~~ the plan itself as it applies to on the job treatment.

1.4) I have not uncovered cases on point in the Second Circuit. If there are, I would venture that they are consistent with the above cases.

2. Plaintiff is not required to exhaust administrative remedies, where such remedies are inadequate, futile, or there is other good cause to justify non-exhaustion. The following authority supports this proposition of law:

2.1) Hupert v. Board of Higher Education of the City of New York 420 F.S. 1087 (1976), at. p. 1104. The Court also notes that the

Supreme Court does not require state administrative or judicial remedies to be exhausted before an action is filed under 42 U.S.C. 1983. Since the statutes have a common derivation, by analogy the same rule would also be applicable to 42 U.S.C. 1981. Cf. Runyon v. McCrary, supra, 96 S. Ct., at p. 2602.

2.2) State Corp. Comm. v. Wichita Gas Co. 290 U.S. 561(1934); Kelly 159 FS 272; Farley 281 F2d 131.

2.3) The facts which justify non-exhaustion are as follows:

a) On September 28, 1976, the Comptroller General of the General Accounting Office published a Report to the Congress on the efficacy to date of the Equal Employment Opportunity Commission ("EEOC"). In summary, their conclusion was as follows:

i) the EEOC has had a minimal effect on the problem of employment discrimination.

ii) Charges have not been resolved in a timely manner. On the average, the waiting period for resolution of a Complaint is 2 years; in fact, the waiting period has been as long as 7 years. There is a 1 in 33 chance of a successful negotiated settlement within a year.

iii) Even where the EEOC find evidence of discrimination, there is only a 50% chance of relief through negotiated settlement. EEOC has litigated 1% of all its cases in which there was unsuccessful negotiation.

iv) Minorities and women continue to be concentrated in the lower paying jobs, and it will be many years before they achieve some degree of parity in the better paying jobs.

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v) With respect to nationwide agreements, for example AT&T's Consent Decree with the U.S. Government, the Report stated that as of August, 1974, there was widespread noncompliance with the Agreement. I note that my own case supports this statement, and brings it down to this very moment. I was the only black on my level at AT&T in the Comptroller's Dept., and I received the worst kind of treatment. I was only fired because I refused to quit despite their pressures to make me do so. It is impossible to say that there are not hundreds, if not thousands, of people who have suffered the same treatment. There is nothing special about me; and if they did it to me, it was a reflex reaction built up over many years of habit. Few complain because they fear the very same fate I am experiencing at this moment.

vi) The Civil Rights law remains essentially unfulfilled, EEOC has had a minimal effect on job discrimination, and its enforcement activities have had little direct impact on employers.

b) From my personal contact with the Agency, I felt it would have been a fruitless and unhappy effort:

i) I spoke to Mr. Joseph Frusteri, the person in charge of AT&T's compliance with the Consent Decree. I went into his office with a Complaint to be submitted. He suggested I make changes in the Complaint, and as soon as I submitted the revised Complaint he would make contact with Ed Anderson and put pressure on him. The fact is, Ed Anderson is an EEO Officer at AT&T, and is the man who personally antagonized

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me by trying to pressure me into dropping my complaints against AT&T. He was powerless to even get me a job description. When Mr. Frusteri told me he would make contact with a man who I personally knew to be powerless and ineffective, I lost all hope in the EEOC.

ii) Mr. Frusteri also stated that EEOC looks unkindly on injunctive relief, the very remedy I need. He also stated that the case would take 6 months to a year to process.

iii) Mr. Frusteri also said that in telephone company cases, the EEOC does not defer to the local Human Rights Agencies.

For these reasons I came to the conclusion that EEOC would have been wasteful of both time and effort, and if I had any forum at all, it would be Federal Court.

3. Even without regard to Section 1981 or Title VII as statutory bases for jurisdiction, this Court has jurisdiction over the constitutional issues raised by Plaintiff's Complaint. Authority is as follows:

3.1) Tramble v. Converters Ink Co., supra; Hupert, supra, at p. 1103.

4. The Federal Court has ample discretion and authority to fashion injunctive relief appropriate to the circumstances in employment discrimination cases, where substantial issues are involved, the balance of hardships are decidedly in Plaintiff's favor which justify preserving the status quo, and there is irreparable injury. The following authority supports this proposition of law:

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4.1) On the appropriateness of injunctive relief, in Jacobsen & Co., Inc. v. ArmstrongCork 416 F.S.564 (1976), the Court stated that if Plaintiff raises questions on the merits which are substantial, and which raise doubt, which require litigation and investigation, then injunctive relief/ is appropriate without regard to a showing of clear likelihood of success. In addition, the balance of hardships must be clearly in favor of Plaintiff, and irreparable injury must be present.

4.2) In this case, if I prove my facts, there is substantial likelihood of success on the merits. Even if there is uncertainty as to success, the Jackson case, supra, is authority that injunctive relief is still appropriate, where the balance of hardships is clearly in the Plaintiff's favor.

4.3) There is no question that the balance of hardships tip decidedly in Plaintiff's favor. How can I possibly injure AT&T by the relief I request. On the other hand, my professional career is in immediate jeopardy, and my financial situation is ruinous. If AT&T tells potential employers the reasons they told me I was fired, false as they are, my career is irreparably injured. In addition, AT&T doesn't have to say anything, even if I say why I was fired, I suffer irreparable injury. As an Attorney and a professional, I have a special interest in my good name and reputation.

4.4) On the issue of irreparable injury, in Ainslie v. Middendorf 381 FS 305 (D.C. Mass., 1974), the Court ruled irreparable injury existed where the remedy at law was inadequate. Here, if I were to proceed through an Administrative Agency, it would be years before

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Justice was done. Who would suffer? I would; not AT&T. AT&T should not benefit from its own wrongful conduct. This undermines any incentive to obey the law, and defeats the very purpose of the law. The evidence is clear that the legal remedy is inadequate. If I had found a job, I would have been without relief because AT&T would offset present income against lost pay. The same would apply if private practice were a clear success. That very offset is a disincentive to an employer to obey the law. Here, I can not expect another job because of the circumstances of my firing, and the existing discrimination in the general job market. As a Court of Equity, this Court has ^{the} duty to fashion a remedy to make the Plaintiff whole so as to destroy the incentive to a wrongdoer such as AT&T to engage in and benefit from illegal conduct.

Although the test of irreparable injury is generally whether money will cure the injury, where the financial loss is substantial irreparable injury has been found. In Hawaiaan Telephone Co. v. State of Hawaii Dept. of Labor & Industrial Relations 378 FS 791 (D.Ct., Hawaii, 1974), the Court found irreparable injury where the telephone company was being required to pay \$832,000 into an unemployment fund where it was unclear that it should do so. The irreparable injury was that \$190,000 in interest would be lost if it turned out that payment was inappropriate, since the Fund did not pay interest. I cite this case in support of the argument that if the telephone company can get an injunction in the above situation, then I am entitled to the same remedy where I face bankruptcy without a source of income.

Similarly, in Com-Share, Inc. v. Computer Complex, Inc., 338 FS 1229 (D.C. Mich., 1971), the Court granted an injunction in a breach of contract situation, where disclosure of confidential information would produce substantial loss of revenue to the Company.

4.5) On the issue of preserving the status quo pending resolution of the action, in Washington Capitols Basketball Club, Inc. v. Barry 364 FS 1193 (D.C. Calif., 1969), the Court defined the status quo as the "last peaceable, uncontested status between the parties which preceded the present controversy." In Union Management Corp. v. Koppers 366 F2d 199 (2nd Cir., 1966), the Court by injunction altered the terms of a contract of employment, where the Plaintiff argued it could not determine how its business was being run by managers of the Company, who were the former owners. The Court stated that "where agreements which require joint action leads to disputes which cannot be dissolved short of litigation it is impossible to place the parties in the exact positions which they enjoyed prior to the disagreement. It follows that the Court must have discretion to fashion such a preliminary injunction as may best approximate past positions in the light of the basic right of the parties."

Barry would support immediate reinstatement with back pay. The Koppers case would support the institution of a contractual relationship. This would be the best remedy. I still have clients to service, and I doubt very seriously whether AT&T would desire my return. As a professional, the physical location of where I work has no bearing on work product. The animosity that would likely arise if

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I were placed in the same environment, would be avoided. It would prevent the possibility of further retaliation. And it would sustain me pending resolution of the issues in this case.

Dated: December 29, 1976.

Respectfully submitted,

Phillip D. Miller
Phillip D. Miller, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
PHILLIP DOUGLAS MILLER, ESQ. :

Plaintiff :

- against - :

THE AMERICAN TELEPHONE &
TELEGRAPH COMPANY ("AT&T"),
JOHN deBUTTS, ROBERT FLINT,
DONALD LAMONT, CYRUS HALPERN,
RODERICK AYA, MESSRS. CHRISTENSON,
ANDERSON, WORTHY, GAMMON AND
CERTAIN OTHER UNNAMED EMPLOYEES
OF AT&T, DEFENDANTS :

Defendants :

Civil Action
No. 76-CIV 5462

NOTICE OF MOTION

----- X
S I R :

PLEASE TAKE NOTICE, that on the complaint and
affirmation by Saul Scheier dated December 31, 1976,
the undersigned will move this court in room 1601,
United States Court House, Foley Square, New York,
New York, on January 18, 1977, at 10 O'Clock in the
forenoon of that day or as soon thereafter as counsel
can be heard, as follows:

1. To dismiss the action against all the defendants
pursuant to Rule 12(b)(6) of the Federal Rules of Civil
Procedure for failure to state a claim upon which relief
can be granted.

2. In the alternative to dismiss the complaint pursuant to Rule 12(b)(2) against the individual defendants for lack of jurisdiction of their persons and to strike Paragraphs (f) through (o) of the complaint, pursuant to Rule 12(f) on the grounds that the allegations contained therein are immaterial and impertinent.

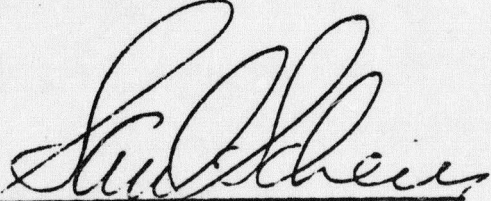
Dated New York, New York
December 31, 1976

Yours, etc.

JAMES A. DeBOIS
CLARENCE M. DUNNAVILLE
SAUL SCHEIER
Tel: 201-221-6557

Attorneys for Defendant
AMERICAN TELEPHONE AND
TELEGRAPH COMPANY
195 Broadway
New York, New York

CC: Phillip Douglas
Miller, Esq.

By 
Saul Scheier

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
PHILLIP DOUGLAS MILLER, ESQ. :

Plaintiff :

- against - :

THE AMERICAN TELEPHONE & :
TELEGRAPH COMPANY ("AT&T"), :
JOHN deBUTTS, ROBERT FLINT, :
DONALD LAMONT, CYRUS HALPERN, :
RODERICK AYA, MESSRS. CHRISTENSON, :
ANDERSON, WORTHY, GAMMON AND :
CERTAIN OTHER UNNAMED EMPLOYEES :
OF AT&T, DEFENDANTS :

Defendants :

AFFIRMATION

-----X
SAUL SCHEIER, an attorney admitted to practice
in the courts of this State, affirms the following under
penalty of perjury:

1. I am one of the attorneys for the defendants
in this action and I am familiar with the proceedings
herein.

2. I submit this affirmation in support of the
within motion to dismiss this action under Rule 12(b)(6) of
the Federal Rules, or alternatively to dismiss the complaint
against the individual defendants under Rule 12(b)(2)

for lack of jurisdiction over their persons and to strike Paragraphs (f) through (o)* of the complaint pursuant to Rule 12(f) because they are immaterial and impertinent to any claims which plaintiff can raise in this court.

I. THE MOTION TO DISMISS FOR FAILURE
TO STATE A VALID CLAIM FOR RELIEF

In his complaint, plaintiff enumerates 15 purported causes of action. He alleges that he was unlawfully discriminated against because of his race, in hiring, terms and conditions of employment, "classification and status", "retaliation", and discharge (a - e).

He asserts further, that AT&T discriminated against him because of his youth in violation of the statutory law of New York and that the individual defendants are personally liable for the actions of AT&T under the provisions of the New York City Administrative Code (f and g). To this array of charges, he adds what he labels "common law actions" of "fraud", deceit and misrepresentation" (h), "breach of contract (i), "mental

* Unless otherwise indicated letters in parenthesis will hereinafter refer to paragraphs of the plaintiff's complaint.

distress" (j), "conversion of personal property" (k), "trespass" (l), and "defamation" (m).

Jurisdiction of this array of claims is allegedly founded upon 42 U.S.C. 1981; Titles VI and VII of the Civil Rights Act of 1964 (42 U.S.C. 2000 Sections d and e); Executive Order 11,246; Section 41 of the Code of Federal Regulations, the Fifth, Thirteenth and Fourteenth Amendments to the U.S. Constitution; Sec. 296 of the Executive Law of New York State and the Administrative Code of the City of New York.

~~However, the only claims which are at all cognizable~~
by this court are those allegedly arising under 42 U.S.C. 1981 and Title VII of the Civil Rights Act of 1964.

Title VI deals with Federally assisted public programs, not private corporations or individuals. Executive Order 11,246 and the Federal Regulations do not confer jurisdiction on this court to entertain actions to enforce personal rights or seek damages. Nor are the Fifth, Thirteenth or Fourteenth Amendments applicable to this case, since no governmental action was involved and it is not alleged that plaintiff was kept in involuntary servitude.

We also believe it unnecessary to discuss the plaintiff's misuse of the doctrine of pendent jurisdiction to support his non federal claims, since it is evident from the face of the complaint that these claims do not have the required "common nucleus of law and fact" with his discrimination claim to support federal jurisdiction. See Almenares v. Wyman 453 F2d 1075 (2d cir. 1972). Each of these claims under state law present entirely separate and independent questions of fact and law.

This leaves only the allegations relating to unlawful discrimination to be considered. In the confusing welter of opinions and insinuations with which the complaint is larded, the following allegations specifically refer to alleged discrimination:

There was discrimination in the terms and conditions under which I was employed that compared to terms and conditions of employment of white attorneys employed by AT&T (b3)

x x x x x

The real reason for my discharge was because I refused to ignore their continued acts of discrimination against me. (e).

x x x x x

I distinctly perceived that part of my problem has not only been my black color, but my age and apparent youth (f). Messrs. Halpern and Aya were the most actively involved in the acts of discrimination and illegality.....the very existance of such people on the payroll evidences discrimination...(g).

The true gravamen of plaintiffs grievance against AT&T which emerges from a reading of the complaint as a whole, is that he was hired into a position which he regards as beneath him as a result of alleged misrepresentations by several of the defendants. The term "discrimination" as plaintiff uses it, connotes what he perceives to be the difference between the status and privileges of a job in the legal department and the position he accepted in the comptrollers department.

He complains that his duties were limited, that he did not care for the work he was assigned to, and that the legal department offices were "large and spacious", whereas his office was "small with metal furniture and had no door". The sole purpose he was hired, he says, was to fill an affirmative action quota for a black person under the consent decree.

Under the heading "retaliation", plaintiff alleges that when he complained of those acts of "discrimination" the defendants retaliated. How? By telling him that some people in Operating Companies of AT&T had complained of his attitude and by subsequently suggesting when he complained about his job that he seek a transfer to the legal department, take another job in the comptroller's department, accept his then current job, or quit.

Sup 11

In sum, the labels "discrimination" and "retaliation" as plaintiff uses them in his complaint are devoid of meaning or legal significance and cannot support a conclusion that there was discrimination against plaintiff vis-a-vis others in the comptrollers department. The complaint itself states that plaintiff was "the youngest person on his level in the company". (f). This allegation in itself contradicts plaintiff's assertion that he was discriminated against.

We are aware that Courts have generally tended to be lenient in construing pro se complaints in Title VII actions inasmuch as plaintiffs in such cases often labor under educational handicaps. In the instant action, however, the pleaded material facts belie plaintiff's conclusory allegations of discrimination. The fact that this action is brought by the plaintiff in person, should not influence the judgment of this court since plaintiff has a Master's degree in English, is a licensed attorney and formerly practiced with the firm of Dewey, Ballantine before he joined AT&T. The complaint should be judged as the work of a trained professional attorney and it is appropriate to assume that it fully articulates the basis on which plaintiff's claim is based. As such, we submit,

it does not present a viable claim for relief.

There is one additional reason why the complaint fails to make out a case against the individual defendants.

The alleged unlawful discrimination relates solely to plaintiff's employment by AT&T. There are no facts alleged, which would support a finding of unlawful employment discrimination against the individual defendants, since only AT&T had an employment relationship with plaintiff. Moreover, Section 703 of Title VII which defines unlawful discrimination practices, applies only to employers. (42 U.S.C. 2000 e-3).

THE MOTION TO DISMISS FOR LACK OF JURISDICTION
OVER THE INDIVIDUAL DEFENDANTS

On December 14, 1976, several copies of the summons and complaint were served on AT&T in apparent conformity with an order of this court permitting service by someone other than a U.S. Marshall. The order also provided, that service on the individual defendants could be effected by serving AT&T with copies of the papers in lieu of personal service on each of the defendants.

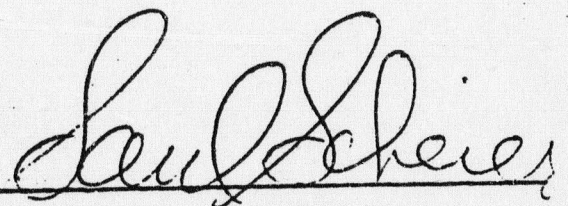
None of the individual defendants named in the caption have been personally served with the summons and

complaint. Nor have they authorized AT&T to accept service on their behalf in this action.

Federal Rule 4 (d) (1) requires personal service of a summons and complaint except in certain circumstances none of which exist in this proceeding. We submit, therefore, that jurisdiction against the individual defendants is absent and the action against them must be dismissed.

Finally, we request that if the court does not dismiss this action in its entirety against all defendants, then Paragraph (f) through (o) of the complaint should be stricken as immaterial and incompetent, since, as discussed earlier, they do not raise any federal questions and arise solely under State law.

Dated New York, New York
January 3, 1977.

A handwritten signature in cursive script, reading "Saul Scheier", written over a horizontal line.

Saul Scheier

#7
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT

MILLER

VS.

AT&T, ET AL

AFFIRMATION

~~PLAINTIFF~~ IN OPPOSITION
TO DEFENDANTS' MOTION TO
DISMISS

FILE NO. 76 CIV. 5462 KTD

The factual issues raised by Defendants' Motion are as follows:

1. Has Plaintiff stated any federal claim upon which relief can be granted against any of the Defendants?

1.1) The answer is yes. Please refer to my Complaint, Amendments thereto as of right, and Memoranda ~~of~~ ^{AND AFFIRMATIONS} Law in support of my Order to Show Cause for preliminary injunctive relief. PDM

1.2) All facts in my Complaint must be deemed true for purposes of this Motion. Accordingly, such factual questions as are raised by Defendants at best raise issues of fact which can only be resolved through factual investigation and trial. In my request for injunctive relief, I have sufficiently addressed myself to whether I have alleged legally supportable claims. Based on the above, Defendants Motion should be unequivocally denied. As this action continues, there will be ample opportunity to delete claims which may appear inappropriate at a later point in time.

1.3) Defendants concede that 42 U.S.C. 1981, and Title VII of the Civil Rights Act of 1964 confer jurisdiction over this action. Having conceded this question of law, the only issue remaining is

whether the additional legal claims alleged are within the pendent jurisdiction of this Court. This is a matter appropriately discussed in my accompanying Memorandum of Law. For purposes of this ~~case~~ ^{AFFIRMATION} ~~case~~, it suffices that the facts supporting the constitutional and federal statutory claims are essentially the same. As can be seen from the Complaint, as amended, the facts in this case all arise from my experiences at AT&T over an 8 month period. Because of the blatancy of Defendants actions, the same facts violate numerous rules of law. The statutory violations under the laws of the State of New York and the City of New York also arise from the same facts. The same is true of the common law causes of action. Similarly, as can readily be seen from an analysis of the laws against discrimination, they basically repeat each other.

1.4) My Complaint alleges 24 legal claims, not 15 as Defendants state in their papers.

1.5) Defendants misquote me. In Page 4 of their Affirmation I do not use the phrase "black color" in Page 10 of my Complaint. An even worse misstatement, which is so bad it suggests an intentional act, is the juxtaposition of statements in Paragraph g.1 of my Complaint referring to Messrs. Aya and Halpern as the architects of discrimination against me, with other statements in Paragraph g.3 of my Complaint referring to the powerlessness and ineffectiveness of the EEO Personnel at AT&T and stating that the very presence of such persons on the payroll evidences discrimination where their power does not go beyond "trying to persuade an employee, through threats if necessary, to forget whatever wrong the employee has experienced." The distortion is total. I have specifically requested this Court to read my papers and

not rely on Defendants misleading characterizations.

1.6) I am an immigrant from a small island. I have not gone far enough in life to consider a \$28,000.00 job "beneath me." I was fired solely because I complained about the discriminatory circumstances under which I was hired and worked.

1.7) It is pointless to address myself to any further statements made in Defendants' Affirmation since all my allegations are deemed true for purposes of this Motion.

PJM

Plaintiff affirms the above under penalty of perjury.

Respectfully submitted

s/ Phillip Douglas Miller, Esq.
Phillip Douglas Miller, Esq.

Dated: January 18, 1976.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MILLER

VS.

AT&T, ET AL

MEMORANDUM OF LAW IN OPPOSITION
TO DEFENDANTS' MOTION TO
DISMISS

FILE NO. 76 CIV. 5462 KTD

The legal issues raised by Defendants Motion to Dismiss are as follows.

1. Does this Court have jurisdiction over Plaintiff's claims under 41 C.F.R. Section 1.12.803-1(a); 42 U.S.C. 2000d; Executive Order 11,246?

1.1) The answer is yes. Pursuant to the above authority, federal contracts contain a non-discrimination provision. I have alleged that I worked on capital contributions ("contributions in aid of construction") while at AT&T, which affected every single contract containing such methods of payment in the Bell System. On this basis, AT&T has violated each contract in which it has received a capital contribution from the United States Government. I am a Third party beneficiary to such contracts. In addition, the Consent Decrees and AT&T's Affirmative Action Plans constitute employment programs under the applicable laws. This Court has broad authority to determine remedies where the violation of a federal right has occurred. In Drew v. Liberty Mutual Ins. Co. 480 F2d 69 (5th Cir., 1973) the Court ruled that a "right of action can be fashioned by a federal court when the beneficiary of a

federal law contends he is deprived of his benefits." 480 F 2d, at p. 74. There the Plaintiff had been fired the day after filing charges of sex discrimination against her employer, The Court granted a preliminary injunction, and counsel fees, ruling that the Court has the power to fashion appropriate remedies to vindicate a federal right.

2. Is the Bill of Rights (First, Fifth, Ninth, Tenth, Thirteenth, and Fourteenth Amendments) applicable to the facts of this case?

2.1) I have alleged violations of the First Amendment. I spoke out against discrimination, and I stated I would seek legal redress, if the wrongs remained uncorrected. If I had not spoken, I would not have been fired.

2.2) The bases for violation of the Fifth Amendment has already been discussed in my papers requesting preliminary relief.

2.3) The Thirteenth Amendment is the constitutional underpinning, inter alia, for the Civil Rights laws. There is no basis for questioning this authority if 42 U.S.C. 1981 is accepted as a jurisdictional basis.

2.4) Jones v. Alfred Mayer 392 U.S. 409, and Runyon v. Mcrary 96 S. Ct. 2586 (1976) have made it clear that the Bill of Rights do not require state action, in order for this Court to have jurisdiction over private acts of discrimination. It is well settled that involuntary servitude does not simply mean ante bellum slavery, but applies to the very acts of discrimination Plaintiff has alleged.

3. Does this Court have pendent jurisdiction over those claims over which it does not directly have jurisdiction?

3.1) The answer is yes. In United Mine Workers v. Gibbs 383 U.S. 715(1966), the Plaintiff was blackballed after accepting a job to reopen a mine closed down because of problems arising from competing unions. The Court ruled that the Federal Courts had jurisdiction over both federal and state causes of action where the entire action before the Court comprises but "one constitutional case" and the claims arise from a common set of facts. That is exactly the case here, as previously discussed. Almenares v. Wyman 453 F2d 1075(2d Cir., 1971), cited by Defendants, support this position.

4. Does this Court have jurisdiction over the individual Defendants:

4.1) the answer without question is yes. Defendants suggest that the laws against discrimination do not reach employees, or non-corporate Defendants. This is totally incorrect. In Almenares, supra, which involved the validity of State laws which could terminate welfare benefits without a hearing, the Court, per J. Friendly, ruled it could enjoin the acts of State officials in their individual capacities. This case also supports my due process claim, since it found injunctive relief appropriate where monetary benefits were denied absent a hearing procedure.

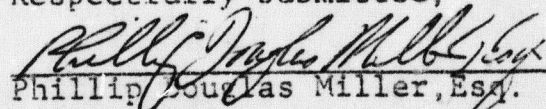
The following cases also support this position. In Bell v. Hood 327 U.S. 678(1946), the Court ruled that an injunction was necessary to protect Fourth and Fifth Amendment constitutional rights, and the persons enjoined were state officers in their individual capacities.

The same result was reached in DeFilippes v. U.S. 370 FS 82 (D.Ct., Ill. 1975), Carter v. Gallagher 452 F 2d 315 (8th Cir., 1971), and Miller v. Saxbe 403 FS 1314 (D.Ct., D.C., 1975). The test arising from these cases is whether the Defendants were directly involved or had direct responsibility. I have not named any person as a Defendant that does not meet this test.

4.2) Defendants also suggest that the method of service was improper. They also misstate the terms of the Court Order by which service was made personally on each and every Defendant, except those whose names I do not know. Reference to the Court Order will show that service was made on a person authorized to receive service of process on behalf of AT&T. Such person was then directed to have an employee of AT&T completely unrelated to the action serve each individual Defendant personally with the required papers. This method of service, fully sanctioned by this Court fully complied with the law. Defendants were served personally by one not a party to the action. Any allegation to the contrary would only state that an Order of Court was wilfully violated, and if this were the case, Defendants would be estopped from so claiming, since they would be the very persons responsible for violation of the law they assert has been violated.

In conclusion, there is no basis whatsoever for Defendants' Motion and it should be denied in full as against each and every Defendant in this action.

Respectfully submitted,


Phillip Douglas Miller, Esq.

Dated: January 18, 1976.

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#8
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MILLER

VS.

AT&T, ET AL

PLAINTIFF'S AFFIRMATION
IN REPLY TO DEFENDANTS'
OPPOSITION TO PLAINTIFF'S
ORDER TO SHOW CAUSE
FILE # 76 CIV. 5462 KTD

Defendants' Memorandum in Opposition raises the following factual questions:

1. Does Plaintiff's Complaint and Order to Show Cause demonstrate a reasonable probability of success on the merits?

1.1) The answer without question is yes. My Complaint, which has been amended as of right, alleges facts under oath which will support a judgment on the merits against each and every Defendant in this action. To support a preliminary injunction in my favor, I have the obligation to show the likelihood of success on the merits under any of the federal claims alleged in my Complaint. On the constitutional issue alone, I have alleged in Paragraph "D" of my Complaint that AT&T "failed to follow its own guidelines and policies in firing me." This allegation asserts a deprivation of my constitutional rights protected under the Fifth Amendment. The proof of this is clear. AT &T has established, written rules which govern the firing of employees. AT&T violated utterly its own rules in firing me. Specifically, the rules for the treatment of employees hired subject to AT&T's Consent Decrees

with the United States Government are as follows:

a) Evaluation of new employees promptly after six months.

b) Begin to document employee performance at the time such performance begins to deteriorate or radically change.

c) Continue such above described documentation until the problem is resolved or disciplinary action is complete, in separate stages:

i) Stage 1. In the initial stage, the supervisor must document oral warnings.

ii) Stage 2. In the advanced stage, the supervisor must sign written warnings personally, specify the date, and the employee to whom the warning is directed must sign the warning personally.

None of these important rules were followed by the Defendants. As I have stated under oath in my Complaint, I was never criticized prior to the time I first complained to my superiors about discriminatory job treatment. Such criticisms and other acts were nothing less than illegal acts of retaliation. As required by the above rules, not once was any criticism of me put into writing. I never received a written warning. I therefore never signed a written warning since none was ever presented to me. The Defendants total failure to follow these rules in documenting any criticisms they had of me, and in failing to warn me of the adverse consequences of any of my actions to which they objected, prior to firing me, was illegal. The Defendants' total failure to follow its own rules proves that my firing was an unconstitutional denial of due process. In addition, my firing is proof of

discrimination under 42 U.S.C. 1981, since an oral contract of employment existed between AT&T and myself. It also proves the alleged violations of Title VII contained in Paragraphs "b"-"e" of my Complaint. It also proves additional violations of 42 U.S.C. 1981 insofar as such allegations relate to my contract of employment. It also proves the Defendants violated the terms of AT&T's Consent Decrees with the United States Government, which as a matter of law is an integral part of my oral contract of employment with AT&T. My firing also proves a conspiracy to violate the law under 42 U.S.C. 1985. My firing also proves a violation of 42 U.S.C. 1986.

1.2) I was fired by Mr. Roderick H. Aya on September 8, 1976. On September 9, 1976, I was personally handed a letter signed by Mr. Aya stating the reasons why I was fired. This was the first writing I received complaining about my work as an employee, and in the letter I was fired. The letter itself evidences the bad faith of AT&T and the individual Defendants in firing me, and further evidences basis for my allegations of Fraud, Deceit, and Misrepresentation. Addressing myself to just one of the reasons given for firing me, the facts are as follows. AT&T's own rules governing disciplinary treatment for employees with an absence problem, specify the following:

a) Supervisors must review attendance of subordinates on a monthly basis, and absences subject to discipline are determined on a 12 month basis.

b) Six specific steps prior to firing are established. No stage can be skipped once Step 3 is reached. The Steps are as follows:

i) Step 1. If a new employee on the job for 4 months or less is absent for more than 4 days, the supervisor is required to discuss the matter with the new employee.

ii) Step 2. If any employee is absent for more than 5 days in the previous 12 months, the supervisor is required to discuss the matter with the employee.

iii) Step 3. If any employee is absent for more than 6 days in the previous 12 months, the supervisor must give the employee a written "CAUTION" on a specific form, and have the employee sign it.

iv) Step 4. If an employee is absent for more than 8 days in the previous 12 months, the supervisor must give another written warning as specified in Step 3. The supervisor must then fill out another Form and submit/^{it}to the Interdepartmental Attendance Review Committee of the Human Resources Development Department ("HRD") for its recommendations.

v) Step 5. If the employee is absent for more than 10 days in the past 12 months, the supervisor must issue a final warning in writing to the employee on a specific form which the employee must sign.

vi) Step 6. If the employee is absent for more than 11 days on the past 12 months, then the employee should be dismissed on his return to work.

I was never given the benefit of the above procedure, first of all. Secondly, there was no reason to, because I was never absent without permission, except on one occasion. On that occasion, I requested in

writing an absence with pay for personal reasons. On my former level, absence with pay for personal reasons is permitted. The request was made when the discriminatory and retaliatory treatment against me was having an unbearable psychological effect. There is no requirement that prior approval be obtained. On September 7, 1976, the request was made in writing, and on September 8, 1976, Mr. Aya fired me over the telephone. My former job entitled me to 3 weeks vacation; at the time of being fired I had 1-2 weeks vacation remaining. How can one be repeatedly absent with almost 2 weeks vacation remaining after being on the job for 8 months. The above rules are specifically required to be followed under AT&T's affirmative action program.

1.3) Additional violations of AT&T's own rules include the following:

a) With respect to job performance and evaluation, under AT&T's own rules it is mandatory that an employee be evaluated any time after 6 months of employment and no later than 9 months. I was never evaluated. I had specifically requested in writing that I be evaluated after I had been on the job for 6 months. With approximately 3 weeks to go before evaluation was absolutely mandated, the Defendants fired me.

b) The job of Tax Attorney in the Comptroller's Dept. was represented to me to be a newly created position. New positions are mandatorily required to be evaluated after 6 months. My job was never evaluated.

c) It is an integral and essential part of AT&T's job

evaluation program, as well as its Affirmative Action Program, for an employee to have a job description. AT&T's own rules require that an employee receive a job description from the first day at work. I did not receive one then. When I discovered months later that I was entitled to one, coupled with the fact that I was not being given the duties I had come to AT&T to do, I asked for one. I was never given one.

These are not by any means the only facts provable at trial. They are sufficient, however, for purposes of this Motion to obtain injunctive relief. On these facts alone there is not only a reasonable probability of success, but a clear certainty of success exists on the merits. Based on the above, the most important tests for obtaining equitable relief have been met: the unconstitutional interference with my rights, resulting in irreparable injury, and the clear certainty of success on the merits because of the facts stated.

2. Does Plaintiff's Complaint and Order to Show Cause demonstrate the existence of irreparable injury necessary to support a claim for preliminary injunctive relief?

2.1) The answer without question is yes. The basis for irreparable injury includes the following facts:

a) My firing was unconstitutional because AT&T failed to follow its own procedures in firing me, in violation of the laws against discrimination, and in violation of due process.

b) Because of being fired by AT&T, I have been unable to find another job. A future employer looks to prior employers for

references. AT&T informed me that I was fired because of my attitude and performance. There is no way a future employer would seriously consider hiring a potential employee under such circumstances. This has been my experience exactly. The very acts of illegality of Defendants have precluded my access to other employment. Reinstatement and clarification of my record at AT&T is absolutely essential in order to even consider other employment.

pgm c) As a result of being fired without notice, and being given only 3 weeks to find another job, and then being fired two days later effective immediately because I was out looking for another job, I was forced to exercise my only other alternative, which was the private practice of law. This has cost me between \$10,000.00-\$12,000.00. I am in a position to declare bankruptcy immediately. I did not seek equitable relief so long as I had the resources, and since I have a license to practice law. But private practice is not viable at this stage of my career ~~form~~^{from} a financial standpoint. It has been a professionally rewarding, but financially disastrous, experience.

d) I accepted the offer from AT&T over two other job offers. This was a career decision for me. Irreparable injury to my career at AT&T has already been done, and injunctive relief is essential to prevent its continuance.

e) An employee's job is recognized by law to be a business. Furthermore, I am a licensed Attorney. AT&T's illegal action has thereby severely damaged my goodwill and good name and reputation as an employee and as an Attorney. As a professional, I have a special interest in their preservation.

f) I was fired immediately and without notice. Even under the best circumstances, it therefore became absolutely impossible, given my profession, color, and salary level, to find comparable employment within a time frame that would have minimized the injury. Based upon the above, the fact of irreparable injury is present without question. It is a sheer falsehood for Defendants to say that monetary damages can cure the consequences of Defendants illegality. Furthermore, the law is clear that where Plaintiff is suffering or will suffer serious financial injury injunctive relief is available. The telephone company itself has made this argument in Hawaii and obtained injunctive relief where the potential injury was purely economic.

3. It is necessary to make the following factual corrections to statements made in Defendants / Memorandum : one, I worked for AT&T for 8 months , not 9 months; two, Defendants fail to mention that my Complaint includes constitutional claims. This is an important fact since the Court had not read my papers at the time of oral argument on January 12, 1976, although they were submitted weeks before on December 27, 1976. While, at the same time, the Court had already read Defendants' papers submitted that morning. This Court can not rely on the accuracy of Defendants papers with respect to the contents of papers submitted by me. Finally, two additional questions must be addressed to determine the appropriateness of injunctive relief, neither of which are properly dealt with in Defendants Memorandum. They are as follows.

4. Does Plaintiff's action raise substantial or doubtful questions which a trial is necessary to resolve, and do the balance of hardships tip decidedly in Plaintiff's favor?

4.1) The answer to both questions is unquestionably yes. A partial listing of the serious and substantial issues raised by this case includes the following:

a) Is AT&T, acting through those employees who run it, this country's largest employer, engaged in a conspiracy to violate the United States Constitution and federal and state laws enacted pursuant thereto, making discrimination in employment illegal?

b) Has AT&T and the employees who run it violated the terms of the Consent Decrees it entered into voluntarily and ⁱⁿ good faith with the United States Government, by which terms AT&T agreed to cease its historical policy of race and sex discrimination?

c) Is AT&T, in order to fill jobs required by Government imposed quotas to be filled with minorities as a remedy for past discrimination, intentionally and fraudulently misrepresenting the nature of such jobs in order to induce minority applicants to take such positions?

d) Is AT&T filling jobs with minorities solely to satisfy Government quotas, with no intention of making such employment positions meaningful in terms of experience and advancement?

With respect to these questions alone, there is no question as to their seriousness and gravity. I am under no legal duty to prove these

issues in this memorandum of facts. It suffices that they are substantial issues to be resolved at trial.

4.2) On the question of balancing hardships. I have already stated that I face bankruptcy, and that my rights to due process of law with respect to my property rights in my good name, reputation, business, and job, have been unconstitutionally violated. AT&T, on the other hand, faces no legal injury at all if the injunctive relief I request is granted. Their assertion that they face irreparable injury if equitable relief is granted because it requires them "to employ and pay one whose services are no longer needed" is so ridiculous on its face it is almost beneath comment. AT&T, this country's largest employer, can not possibly suffer harm from the return of a single, solitary lawyer illegally fired. And if they are harmed, in whatever way, it is a burden they must bear under the law. Nor can AT&T suffer irreparable injury from contracting with one black lawyer at a rate of pay no less than his previous salary including benefits, which amounts to approximately \$30,000.00, where AT&T's gross income exceeds \$30 billion dollars, such lawyer was illegally fired from AT&T's employ, was forced into private practice by AT&T's illegal conduct and still has the duty to service clients, and AT&T in all likelihood does not have a single black lawyer in New York or in the country on retainer despite its obligations to contract with minority businesses, and despite the hundreds of thousands of minority employees, and despite the tens of millions of minority subscribers to telephone service.

Thus, on each and every factor affecting the appropriateness of injunctive relief, the factual basis to support the granting of injunctive relief is solid and complete. If this Court exercises its discretion to refuse to grant injunctive relief under these facts it would be a gross and total abuse of its discretion to apply and enforce the law of this land with fairness and reason.

Respectfully submitted

Phillip Douglas Miller Esq.
Phillip Douglas Miller, Esq.

Dated: January 18, 1976.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK:

MILLER

VS.

AT&T, ET AL

PLAINTIFF'S MEMORANDUM OF LAW
IN REPLY TO DEFENDANTS
OPPOSITION TO PLAINTIFF'S
ORDER TO SHOW CAUSE

FILE # 76 CIV.5462 KTD

Defendants' Memorandum in Opposition raises the following legal questions:

1. What are the factors used to determine the appropriateness of the extraordinary remedy of a preliminary injunction?

1.1) The standards as set out in Page 2 of Defendants' Memorandum is misleading.

1.2) The factors are as follows, and there is no question whatsoever as to the correctness of these factors:

- a) the existence of irreparable injury.
- and b) substantial questions are raised which require litigation and investigation, or Plaintiff makes a showing of clear likelihood of success on the merits
- and c) the balance of hardships that would result from granting equitable relief tips decidedly in Plaintiff's favor.

The authority for the above are to be found in my Memorandum of Law submitted along with my Order to Show Cause at the request of this Court, as well as some of the cases cited by Defendants, which will be discussed below. Proof that each and every standard has been fully and completely met is to be found in my Complaint and in my Memorandum of Facts accompanying this Memorandum of Law.

1.3) The relief I request will grant in part the relief I will obtain upon judgment. However, important constitutional issues are at stake, as well as the enforcement of federal and state laws against discrimination, against this country's largest employer. Where, as here, each of the traditional factors are met, the Courts have not hesitated to grant equitable relief without regard to whether the relief is akin in part to the relief requested on judgment. To give just one example of authority to support this position, I cite a case referred to in Defendants' Memorandum. In 414 Theatre Corp. v. Murphy 499 F 2d 1155(2d Cir., 1974), this Court granted a preliminary injunction to operators of coin operated movies, or peep shows, enjoining the licensing procedure established by the City of New York regulating such peep shows, or pornographic movies, on the basis that the licensing procedure was an unconstitutional violation of the First Amendment. The relief granted was virtually, if not exactly, the entire relief sought by Plaintiff's in that action. In my case, the Defendants have provably violated the Due Process clause of the Fifth Amendment of the United States Constitution in firing me. The case is authority in support of my position since I am seeking an injunction to prevent an existing and continuing violation of my constitutional rights. I do not believe it is possible for this Court to enjoin the City of New York from interfering with the constitutional rights of purveyors of pornography, and not enjoin AT&T and its employees, this country's largest employer, from unconstitutionally interfering with a black lawyer's right of contract and right to be protected from illegal

dismissal.

2. Has Plaintiff established irreparable injury as a matter of law?

2.1) The answer is yes. It is well settled that the violation of constitutional rights constitutes irreparable injury as a matter of law. 414 Theatre Corp., supra. In Keyer v. Civil Service Commission of the City of New York 397 FS 1362 (E.D., N.Y., 1975), the Court distinguished the recent case of Sampson v. Murray 415 U.S. 61 (1974) on the basis that Sampson had stated that temporary loss of income ultimately to be recovered is not assuredly irreparable injury but "in genuinely extraordinary cases where the employee's discharge so far departs from the normal situation irreparable injury might be found." Keyer then ruled that civil service employees fired while under investigation and given no opportunity to respond to the charges against them, was a prima facie violation of their constitutional rights and reinstatement with back pay was mandated. The facts in Keyer are identical to my case in major respects: one, the Plaintiffs were employable in a limited and specialized field, i.e. law enforcement officers, and their dismissal was a stigma which prevented them from finding other employment. This is also true of me. My firing was a stigma which precluded other employment, and my profession, color, and salary level makes it difficult even under normal circumstances to find comparable employment. Two, the Plaintiffs in Keyer were ruled to have been irreparably injured because of their loss of expectation of advancement, and because of their large debts to creditors. In my case, as previously stated, I face bankruptcy; in addition, one of the

reasons I accepted AT&T's offer was because I was told that the position I was hired to fill was in preparation for another position which was needed to be filled in 2-3 years.

Sampson is, of course, distinguishable on its facts in many respects, since the injury to me is not merely loss of temporary income; there was no violation of the employer's own rules in Sampson; and, there was no violation of an agreement with the United States Government which was intended to prohibit the very acts of illegality imposed upon me, in Sampson. But even accepting Sampson it is authority that injunctive relief is appropriate in an employment termination case where the discharge is a significant departure from the norm. The facts which distinguish Sampson prove the latter test.

In Schrank v. Bliss 412 FS 28 (D.Ct., Fla., 1976), a Deputy Sheriff was fired because his landlord complained to his boss that he had not paid his electricity bill. His superior told him to resolve the matter immediately, although he alleged it had been paid. Words were exchanged with his boss and he ended up being fired. He was without income to support his family, and he could not find other employment. The Plaintiff brought action under 42 U.S.C. 1983, inter alia, and the Court granted a preliminary injunction because of irreparable injury to Plaintiff. This/^{case} is authority to support my request for equitable relief even without regard to the constitutional issue.

2.3) for additional cases and discussion of this issue, please refer to my Memorandum of Law in support of my Order to Show Cause.

2.4) To establish irreparable injury, Plaintiff may show serious finanvial injury will result in the absence of injunctive relief.

It is totally incorrect to state that injunctive relief is inappropriate where monetary injury is alleged. In a case cited by Defendants, 414 Theatre Corp. v. Murphy 499 F2d, supra, at p.1160, the Court granted injunctive relief on the basis, inter alia, that to deny injunctive relief to Plaintiffs, purveyors of pornography, would result in irreparable injury of an economic nature. In Bloodworth v. OxfordVillage Townhouses, Inc. 377 FS 709 (N.D., Ga., 1974), the Federal Court enjoined the increase of monthly charges, and the exclusion of electricity from such charges, by the Landlord, on the basis that " in the economic reality of the Plaintiffs' standard of living, such a large increase might have been tantamount to eviction or impose substantial financial hardships entailing large sacrifices." In Hawaiaan Telephone Co. v. State of Hawaii Dept. of Labor & Industrial Relations 378 FS 791 (D.Ct., Hawaii, 1974), cited in Plaintiff's other Memorandum of Law, the telephone company obtained an injunction allowing it to withhold paying \$832,000.00 into a State Unemployment Insurance Fund, on the basis that it might lose \$183,000 in interest on the above sum. I cannot believe that the telephone company can get an injunction to prevent the possible loss of interest, but injunctive relief is unavailable to me because of the actual loss of my job because of the telephone company's unconstitutional actions, and in addition I face bankruptcy. Injunctive relief is essential to protect my credit and reputation, as well as to protect my creditors who contracted with me in good faith.

2.5) Please refer to my Memorandum of Law in support of my Order to Show Cause for additional cases on this issue.

3. The following is an analysis of the cases cited by Defendants.

3.1) Hudson Tire Mart, Inc. v. Aetna Casualty & Surety Co. 518 F2d 671 (2d Cir., 1975) is totally inapplicable. That case involved a Corporation seeking an injunction to protect its Fifth Amendment right of self incrimination, where the Corporation's officer was indicted for arson and the insurance sought to depose the officer under the terms of the insurance policy. This case is irrelevant, standing as it does for the proposition that a Corporation has no protection against self- incrimination.

3.2) 414 TheatreCorp., supra. This case has been previously discussed, and is in fact authority for Plaintiff's position.

3.3) Sonesta International Hotels Co. v. Wellington Associates 483 F2d 247 (2d Cir., 1973). This case involved a tender offer wherein it was alleged a failure to disclose material information. The facts are totally inapplicable, and furthermore, equitable relief was granted. The case accurately describes the bases for injunctive relief, incorrectly stated by Defendants. Plaintiff has already shown that all the standards have been met.

3.4) Machen v. Johnson 174 FS 522 (D. Ct., N.Y. 1959). There, one boxer sought to enjoin another boxer from fighting the world champion, on the basis that the latter had a duty under to contract to first have a return match with the Plaintiff. The injunction was denied on the basis the balance of hardships were in Defendant's favor. I have already shown that the balance of hardships tip decidedly in my favor. Defendants have made no showing at all to the contrary.

3.5) Hambros Bank, Ltd. v. Meserole 287 FS 69 (S.D., N.Y., 1968). The facts are totally inapplicable, involving competing tender offers. On the facts, the Court ruled Plaintiffs failed to show a substantial likelihood of success on the merits. I have already made that showing.

3.6) Gresham v. Chambers 501 F2d 687 (2d Cir., 1974). There, a Professor alleged the selection of an Associate Dean was discriminatory because it was done by informal word of mouth selection. The Court ruled there was no evidence of injury to support injunctive relief, much less evidence of discrimination. The facts are totally inapplicable. Given the opinion, I don't see why the action was brought. I have already shown the clear basis for injunctive relief in my case.

3.7) Faro v. New York University 502 F2d 1229 (2d Cir., 1974). There Judge Kevin P. Duffy ruled after a 3 day hearing that the evidence failed to disclose any basis for discrimination. This ruling was upheld on appeal. Plaintiff alleged sex discrimination in the employer's denial of her request to make an opening for her after the expiration of her contract. This case is totally inapplicable on the facts. I was not denied a job; I was fired. This case also stands for the proposition that College Professors who are selected for positions by their peers based upon their qualifications and academic reputation are not the type of persons a Federal Judge may fairly review to determine whether or not they were in fact qualified, since it would substitute the judgment of a Judge over one's peers. AT&T had the duty under the law to evaluate me but refused to do so. Defendants have raised no issue through their Counsel that I was unqualified, or failed to perform, although this was the purported reason for firing me.

In fact, they have stated to this Court in the context of criticizing me as a pro se Plaintiff, as if there were something wrong with a lawyer seeking to protect his own rights, and/in the context of criticizing my Complaint, that I am a "trained professional." This is true. As a trained professional, I question the use of this case where Defendants are opposing my request for preliminary relief, yet they make not even the slightest attempt to present facts before this Court to support the purported reasons for firing me, which include my alleged lack of performance.

3.8) Poe v. Michael Todd Co. 151 FS 801 (S.D., N.Y., 1957). The facts are totally inapplicable, involving an attempt to enjoin the exhibition of a movie, on the basis that Plaintiff was denied screen-writing credit. The Court ruled the injury to the Defendant would exceed the injury to Plaintiff if relief were granted, adding that relief after trial would still be timely. In my case, the facts are clearly otherwise.

3.9) Blaich v. National Football League 212 FS 319 (S.D., N.Y. 1962). The facts are totally inapplicable, involving an attempt to lift the blackout of a football game. The Court denied the injunction, inter alia, on the basis of the economic injury to Defendants, and because the equities were in Defendants favor and since Plaintiffs were complaining about nothing more than a minor inconvenience.

3.10) Jerome v. Viviano Food Co., Inc. 489 F2d 965 (5th Cir., 1974). Defendants quote extensively from this case. The facts are totally distinguishable. There, Plaintiff alleged the denial of employment based on sex discrimination. The Court ruled back pay

would satisfy the injury, and that no employer/employee relationship ever existed. Thus, to grant injunctive relief would actually alter the status quo. In my case, I was fired, not denied a job. Furthermore, Defendants could not reasonably be suggesting that an employer who illegally fires an employee has thereby destroyed the employment relationship ab initio. I fail to see the reason for citing this case. Unlike Jerome, injunctive relief would restore the status quo, not alter it in my case.

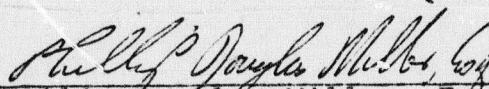
In conclusion, Defendants have cited no authority applicable to the facts of this case which would provide a basis for denying the equitable relief Plaintiff has requested. They have cited cases which give the general rules, only. I have cited cases which apply directly to the facts of my case, and I have presented to this Court facts which without question prove that each and every standard used to determine the appropriateness of injunctive relief has been met.

4. What is the most appropriate form of injunctive relief?

I have requested reinstatement and transfer to the Tax Legal Dept. of AT&T, or a contract for legal services. The latter is requested because I have clients to service. Reinstatement without room for time to service these clients would be unfair to me and to my clients. Also, judging from Defendants past conduct, I expect misery upon my return to my old job. This would be avoided if the Court Ordered appropriate instructions against Defendants to preclude retaliation, and transferred me to the job I should have had from the beginning. Defendants have given as one of the reasons for firing me that I refused to transfer

to Tax Legal. Assuming this is true, it suggests that this had been offered to me but I refused. In fact, the suggestion was made to transfer, but I refused because an offer to transfer was not clearly made. This is to show that Defendants do not have any justifiable basis for protesting a transfer which they themselves say they had previously offered, although in fact they had only suggested it. Thus, under the circumstances a transfer to Tax Legal would be correct and appropriate. At the least, this Court has to in the fair exercise of its discretion restore me to my old job, even though this would be a bad choice. Finally, a contract for legal services, clearly protects me from retaliation, and it prevents continuing irreparable injury during the pendency of this action, and it allows me to service existing client(which would preserve the status quo exactly). From a standpoint of personal preference, if the Court wishes to consider this, I have no preference over the transfer alternative if it allows me to complete work for existing clients, nor over the contract alternative to the extent it restores me at the least to my previous income level including benefits.

Respectfully submitted,


Phillip Douglas Miller, Esq.

Dated: January 18, 1979

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

#10
----- X
PHILLIP DOUGLAS MILLER, ESQ. :

Plaintiff :

- against - :

Civil Action
No. 76-CIV 5462

THE AMERICAN TELEPHONE &
TELEGRAPH COMPANY ("AT&T"),
JOHN deBUTTS, ROBERT FLINT,
DONALD LAMONT, CYRUS HALPERN,
RODERICK AYA, MESSRS. CHRISTENSON,
ANDERSON, WORTHY, GAMMON AND
CERTAIN OTHER UNNAMED EMPLOYEES
OF AT&T, DEFENDANTS :

Defendants :
----- X

DEFENDANTS' MEMORANDUM IN OPPOSITION TO
PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Statement

This memorandum is being submitted in opposition to Plaintiff's motion for a preliminary injunction to compel the defendant American Telephone and Telegraph Company (AT&T) to immediately reinstate Plaintiff to his former job with the Company and transfer him to its legal department or alternatively to enter into a retainer contract for legal services with Plaintiff.

Apart from the truth or falsity of the Plaintiff's claims herein, the complaint and moving affidavit fail utterly to demonstrate either a reasonable probability of success in this action or the existence of irreparable injury necessary to support a claim for preliminary

? → injunctive relief. Monetary damages for Plaintiff's loss of employment are readily available and any alleged loss of pay and benefits can be calculated with precision. On the other hand the relief which Plaintiff seeks would cause irreparable injury to the defendant AT&T by requiring it to employ and pay one whose services are no longer needed.

The Proceedings Herein

8 ✓ As stated in the complaint Plaintiff was employed in the Comptrollers department of AT&T for approximately 9 months until September 1976. He commenced this action in December, approximately three months after his employment ended.

Correct ✓ The complaint sets forth 15 alleged causes of action including claims of race and age discrimination; fraud, deceit and misrepresentation; breach of contract; conversion and other assorted claims purportedly arising under state and local, statutory and common law.

and it ✓ For a remedy, Plaintiff demands judgment for 10% of the annual salary of each individual defendant; 25% of the annual salary of each individual defendant to be paid by AT&T; \$100,000 for each employee allegedly involved in the purported acts of discrimination; \$1,000,000 for each of his alleged 15 causes of action, and reinstatement and back pay or alternatively a contract of retainer for legal services plus back pay.

The defendants have moved to dismiss the action for failure to state a claim for relief and for lack of jurisdiction over the persons of the individual defendants. That motion is returnable before this Court on January 18.

Argument

PLAINTIFF MAY NOT BE GRANTED INJUNCTIVE RELIEF

It is well settled principle that preliminary injunctions, being an extraordinary remedy, are not routinely granted. Before a preliminary injunction may issue, the Plaintiff must make a three-fold showing:

1. Probability of success on the merits;
2. Irreparable harm if the relief is not granted;
3. Upon a balancing of interests, that the hardships to the plaintiff far outweigh the harm to the defendant.

The Second Circuit has consistently held that the above three requirements are the sine qua non of any injunctive relief. Hudson Tire Mart, Inc. v. Aetna Casualty and Surety Company, 518 F 2d 671 (2nd Cir. 1975); 414 Theatre Corp. v. Murphy, 499 F 2d 1155 (2nd Cir. 1974); Sonesta International Hotels Corp. v. Wellington Associates, 483 F 2d 247 (2nd Cir. 1973). Where the court determines that the plaintiff has not met all three criteria, injunctive relief has been denied. Hudson Tire Mart, Inc. v. Aetna Casualty & Surety Co., supra; Machen v. Johanson, supra;

Hambros Bank, Ltd. v. Meserole, 287 F. Supp. 69 (S.D.N.Y., 1968). These requirements have been recently applied in equal employment actions. Gresham v. Chambers 501 F2 687 (2nd Cir. 1974); Faro v. New York University, 502 F2 1229 (2nd Cir. 1974).

Usually, the plaintiff must show that his right to injunctive relief is "clear, reasonable and well-defined". Machen v. Johanson, supra. However, the burden on the plaintiff is even heavier in cases like the one at bar, where the granting of such relief would in effect grant to the plaintiff all or part of the relief to which he would be entitled after a trial on the merits. Hambros Bank, Ltd. v. Meserole, 287 F. Supp 69, 71 (S.D.N.Y. 1968). See also, Poe v. Michael Todd Co., 151 F. Supp. 801, 803, (S.D.N.Y., 1957); Addressing this issue, Judge Weinfeld noted in Blaich v. National Football League, 212 F. Supp. 319, 320 (S.D.N.Y., 1962):

"To achieve this extraordinary and drastic remedy in advance of the trial, where all the contested issues could be fully explored, the plaintiffs must show a clear right to relief and that irreparable injury will result if the motion is denied. (Emphasis supplied)

In Blaich, the motion for preliminary injunction was denied primarily because the plaintiff could not show a clear right to the relief. "While it is true that the likelihood of plaintiff's ultimate success is not the sole criterion on their motion for a preliminary injunction, the absence of a clear prospect that they will eventually prevail upon the trial is a factor of significance." 312 F. Supp. at 324.

Insofar as the Plaintiff's attempt to show irreparable harm by the denial of the preliminary injunction, the law is clear that something other than monetary damages must be sought to justify the extraordinary remedy of injunction, because the equity powers of a court may not be invoked where the law provides an adequate remedy. As the Fifth Circuit stated in Jerome v. Viviano Food Company, Inc., 489 F2 965 (5th Cir. 1974)

"Appellant relies strongly upon a Fifth Circuit case decided in 1973, Drew v. Liberty Mutual Insurance Co., 480 F.2d 69 (5th Cir. 1973).

There the court approved injunctive relief to maintain the status quo prior to asserted discriminatory discharge where it was alleged that the discharge was occasioned by an equal employment opportunity complaint by the employee. In the instant case there is no existing relationship between the employee and the employer, and monetary damages in the form of back wages can compensate for the injury. These facts serve as valid distinctions in terms of the proofs essential to establish irreparable harm between the instant case and the Drew case."

Application of the aforementioned criteria for injunctive relief to the facts of the instant case mandate summary denial of Plaintiffs' motion for injunctive relief. The Plaintiff cannot satisfy any of the aforementioned criteria and therefore the motion for injunctive relief should be denied.

Respectfully Submitted,

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Of Counsel

RICHARD C. HARTGROVE

By *Saul Scheier*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

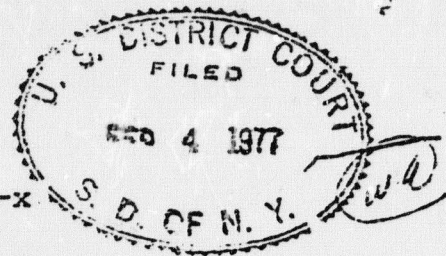
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PHILIP DOUGLAS MILLER, ESQ.,

Plaintiff,

-against-

THE AMERICAN TELEPHONE &
TELEGRAPH COMPANY ("AT&T"),
JOHN deBUTTS, ROBERT FLINT,
DONALD LAMONT, CYRUS HALPERN,
RODERICK AYA, MESSRS. CHRISTENSON,
ANDERSON, WORTHY, GAMMON AND
CERTAIN OTHER UNNAMED EMPLOYEES
OF AT&T,

Defendants.
-----X



76 Civ. 5462 (KTD)

MEMORANDUM AND ORDER

APPEARANCES:

PHILIP DOUGLAS MILLER, ESQ., Plaintiff
Pro Se

JAMES A. DeBOIS, ESQ.
CLARENCE M. DUNNAVILLE, ESQ.
SAUL SCHEIER, ESQ.
Attorneys for Defendants

MICROFILM

FEB 4 - 1977

KEVIN THOMAS DUFFY, D. J.

Plaintiff, a black lawyer and former employee of American Telephone and Telegraph Company (AT&T), has brought this pro se action against AT&T and various named and unnamed AT&T employees alleging, inter alia, in approximately 24 separate causes of action, racial discrimination in hiring, terms and conditions of

employment, classification and status, retaliation and discharge, as well as a slew of "common law" claims, including fraud, deceit, misrepresentation, breach of contract, mental distress, conversion and trespass.

The gist of plaintiff's complaint follows.

On January 12, 1976 he began to work for AT&T. It was his understanding that he would be working in the Comptroller's Department as a tax attorney, responsible for matters dealing with investment credit, depreciation and cost accounting, and that he was to be groomed for the position of Manager, Tax Research and Planning, when, in two or three years, the present manager would be retiring. He also understood that he would be entitled to certain annual salary increments and other more immediate fringe benefits. It is claimed, however, that he performed the duties of an accountant, and not an attorney; he was given no responsibility in any of the allegedly promised areas; he found that the manager was not due to retire for 5 1/2 years; and the benefits and raises were not immediately forthcoming. Plaintiff contends that he was induced to take the job at AT&T merely to satisfy AT&T's minority quota, and that a subsequently hired white female attorney was given the position and responsibility promised him.

Plaintiff further asserts that his treatment during his employ had discriminatory underpinnings ostensibly resulting from complaints made by him about his job. As a result of a statement submitted by plaintiff to his superiors on July 1, 1976, it was suggested that he transfer to the Tax Legal Department, accept another position within the Comptroller's Department or voluntarily leave the company. Plaintiff, however, refused these options because "it was [AT&T's] duty to take some affirmative step to rectify the wrong" (Complaint ¶d(1)); he then indicated to AT&T that he would begin legal proceedings "if the matter could not be resolved in a way [he] considered fair." (Id).

On September 9, 1976, two days after plaintiff had requested an absence without pay "for personal reasons," he was fired because of his "attitude and performance," and was given three weeks to find another job. Plaintiff claims that his performance record was a good one, and that his discharge represented the last in a continuing series of discriminatory acts. Unable to find a satisfactory position, plaintiff embarked on the private practice of law.

On January 11, 1977, four months after his termination by AT&T, and one month after commencing

this action, plaintiff moved by order to show cause for a preliminary injunction seeking back pay and compelling his reinstatement, not to his former position at AT&T, but to be transferred to AT&T's Legal Department. He alternatively seeks to require AT&T to enter into a retainer agreement for his legal services at a rate equal to his former compensation - \$28,000 - plus benefits.

Defendants have cross moved to dismiss the action on two grounds: for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6), F.R.Civ.P.; and for lack of in personam jurisdiction over the individual defendants pursuant to Rule 12(b)(2), F.R.Civ.P. Alternatively, they move to strike portions of the complaint as immaterial and impertinent pursuant to Rule 12(f), F.R.Civ.P.

PRELIMINARY INJUNCTION

Plaintiff essentially reasons that since private practice is not financially viable and he will, therefore, not be in a position to prosecute the suit if he has to wait for trial, he is entitled to speed the resolution of his claims through the medium of mandatory preliminary injunctive relief. I disagree.

The purpose of a preliminary injunction is to maintain and preserve the status quo until such time as

the case can be ultimately resolved on the merits. SCM Corp. v. Xerox Corp. 507 F.2d 358, 361 (2d Cir. 1974); Unicon Management Corp. v. Koppers Company, 366 F.2d 199, 204 (2d Cir. 1966); 7 Moore's Federal Practice ¶65.04[1] (2d ed. 1975). The relief plaintiff seeks, however, will not preserve the status quo since plaintiff has never occupied either of the requested statutes. In fact, no employment or other relationship between the parties existed at all at the time this suit was brought since plaintiff had been discharged three months prior thereto.

Moreover, where the granting of an injunction would substantially give plaintiff the ultimate relief requested, a clear right to such relief must be shown. Blaich v. National Football League, 212 F.Supp. 319, 320 (S.D.N.Y. 1962). Such a clear right has not been shown either by plaintiff's conclusory allegations in his affidavit, or by his oral presentation on the return date of the motion or did plaintiff seek to introduce evidence on the issue at that time. Additionally, plaintiff's claimed need for immediate relief is undercut by the delay with which plaintiff has sought to obtain it. Although this delay may be explained by plaintiff's inability to discern at an earlier date that he could not make a satisfactory living in private practice - and his present adverse financial situation is not to be taken

lightly - it is clear that whatever ill effects resulted from the alleged acts of discrimination were concretely felt months prior to this time, when plaintiff unsuccessfully sought a position with another company.

LACK OF IN PERSONAM JURISDICTION

Defendants assert that personal jurisdiction over the individually named defendants is lacking as a result of defective service. On December 14, 1976 several copies of the summons and complaint were served on AT&T in conformity with an order filed December 8, 1976 and signed by the Clerk of this Court, pursuant to Rule 12(a) of the General Rules of the United States District Courts for the Southern and Eastern Districts of New York, ostensibly appointing a person other than the U.S. marshall to serve process. The order, however, went beyond the mere appointment of a process server; in effect, it appointed AT&T as an agent for the service of process on the individual defendants, and, in authorizing expedient "last resort" service in this manner, See N.Y.C.P.L.R. ¶308(5), it is of no force and effect. None of the individual defendants have authorized AT&T to accept service on their respective behalf; therefore, none of the individual defendants have been personally served in a manner which

statutorily comports with due process dictates. Rules 4(d)(1)(7), F.R.Civ.P.; N.Y.C.P.L.R. §308. The action is thus dismissed as against the individual defendants. The motion to dismiss the complaint for failure to state a claim will be considered only as to the remaining defendant, AT&T.

FAILURE TO STATE A CLAIM

Plaintiff asserts, in shotgun fashion*, claims for violation of his rights under 42 U.S.C. §§1981, 1982, 1985(c), 2000(d) and (e), Executive Order No. 11246, 41 C.F.R. §1.12.803-1, as well as the First, Fifth, Ninth, Tenth, Thirteenth and Fourteenth Amendments to the United States Constitution. He additionally asserts, under pendent jurisdiction, claims of fraud, deceit, misrepresentation, breach of contract, mental distress, conversion of personal property, trespass, defamation, and violations of both the New York Executive Law §§292.1, 296.1, 297.9 and the New York City Administrative Code §§B1-7.0, 343-8.0.

The claim based on constitutional

* Plaintiff has numerous times reminded this Court of his illustrious legal qualifications. I am not unmindful, however, of the liberality with which pro se complaints must be construed, Haines v. Kerner, 404 U.S. 519 (1972), and I hesitate to depart from that principle in this case.

amendment violations are dismissed. Plaintiff has failed to assert either the requisite governmental or state action required for the applicability of the First, Fifth, and Fourteenth Amendments; or facts establishing involuntary servitude under the Thirteenth. Both the Ninth and Tenth Amendments are inapplicable in this context.

The Title VI claim, 42 U.S.C. §2000(d) et seq. is likewise dismissed since Title VI is aimed at discrimination in federally funded programs, clearly not in issue in this case. Nor is 42 U.S.C. §1982, prohibiting racial discrimination in the sale or rental of property, applicable here. 41 C.F.R. 1-12.8 et seq. sets forth the procedures for carrying out the requirements of Executive Order No. 11246 which deals with equal employment opportunities in government contracts and federally assisted construction contracts; pursuant thereto, 41 C.F.R. §1.12.803-1 provides for the inclusion of an equal opportunity clause in such contracts. Neither authority is relevant in light of the issues raised in the complaint. Thus, these claims are also dismissed.

At first blush, 42 U.S.C. §1985(3) appears applicable. That section reaches certain private conspiracies to deprive persons of their legal rights.

A legally sufficient §1985(3) claim must aver a conspiracy between two or more persons to deprive another of the equal protection of the law, or of equal privileges and immunities under the law, as well as an act in furtherance of the conspiracy which causes injury or deprivation of rights. Girard v. 94th Street and Fifth Avenue Corp., 530 F.2d 66 (2d Cir. 1976). However, regardless of the amount of persons allegedly involved, the conspiracy requirement is not met if the acts complained of represent the implementation of a single policy of a single policymaking body, as opposed to the convergence of multiple and separate determinations. Id. It is apparently plaintiff's position that the individual and corporate defendants conspired to deprive him of his civil rights because of his race; but the complaint is totally devoid of allegations of conspiracy. Even if such assertions could be gleaned from the complaint and accepted as true for the purposes of this motion, it does not appear that the acts alleged were other than the implementation of a single AT&T policy. Indeed, his assertions relating to the manner in which he was hired, treated while an employee, and discharged support the operation of a collective judgment, rather than the requisite series of individual decisions.

As such, the complaint is insufficient to state a \$1985(3) claim.

Finally, the Title VII claim, 42 U.S.C. §2000e et seq., otherwise cognizable, is also dismissed. Plaintiff has concededly failed to exhaust the administrative avenue of relief, a prerequisite to suit in the federal courts. See Johnson v. Railway Express Agency, Inc. 421 U.S. 454 (1975).

It appears, however, that plaintiff has managed to state a claim against AT&T based on 42 U.S.C. §1981, a statute designed to reach private acts of discrimination separate and apart from any relief available until Title VII. Johnson v. Railway Express Agency, Inc., supra. Defendants glibly oppose the sufficiency of this claim by suggesting that plaintiff's use of the terms "discrimination" and "retaliation" are devoid of meaning or legal significance, and could not support a finding of discrimination in this case. Whether plaintiff can prove his claim is a matter to be appropriately addressed on a motion for summary judgment or at trial; I cannot concur with defendants' evaluation based merely on the pleadings.

Since this Court has jurisdiction over plaintiff's §1981 claim against AT&T by virtue of 28 U.S.C.

§1343(4), a consideration of the non-federal claims is in order. Defendants cavalierly assert that the state claims must be dismissed for improper use of the pendent jurisdiction doctrine.

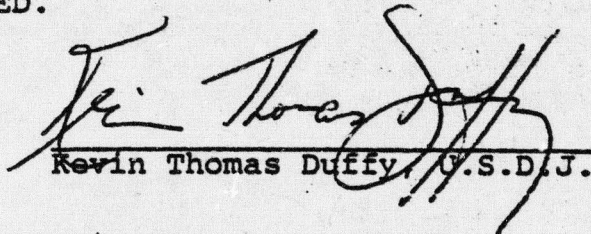
Before reaching this issue, the claims based on violations of New York Executive Law §§292.1, 296.1, 297.9 and New York City Administrative Code B1-7.0 must be dismissed. Neither claim is enforceable in federal court since both are part of administrative schemes which are administered by the State Division of Human Rights and the City Commission on Human Rights, respectively, with judicial review in state courts. The claim based on New York City Administrative Code §343-8.0 is also dismissed, as that section deals with discrimination in employment of city contractors and suppliers, inapplicable here.

As to the remaining claims, however, defendants' motion is denied. Pendent jurisdiction exists whenever the state and federal claims "derive from a common nucleus of operative fact" such that a plaintiff "would ordinarily be expected to try them all in one judicial proceeding." United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966). All of plaintiff's remaining state claims appear to arise from the same set of facts which gave rise to his §1981 claim, and as such, fall properly within the scope of

this related basis of jurisdiction. Since defendants have not raised any issue relating to whether these individual state claims are legally sufficient, I will not consider the same sua sponte.

Plaintiff's motion for a preliminary injunction is denied. The action is dismissed as to the individual defendants. The motion to dismiss the complaint is granted except as to the §1981 claim and related state claims against AT&T to the extent stated in this opinion. The motion to strike portions of the complaint is denied, except as to those claims which have been dismissed.

IT IS SO ORDERED.


Kevin Thomas Duffy, U.S.D.J.

Dated: New York, New York
February 3, 1977

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 -----X

4 PHILLIP DOUGLAS MILLER, Esq., :

5 Plaintiff, :

6 - against - :

7 THE AMERICAN TELEPHONE & TELEGRAPH :
8 COMPANY ("AT&T"), et al., :

9 Defendant. :

10 -----X

11
12 New York, N. Y.
13 January 12, 1977

14 B e f o r e:

15 HON. KEVIN THOMAS DUFFY,

16 District Judge

17 Appearances:

18 PHILLIP DOUGLAS MILLER, Esq., pro se

19 SOL SCHREIER, Esq.
20 Attorney for Defendant

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THE COURT: Phillip Douglas Miller against American Telephone & Telegraph Company. All right, Mr. Miller. I understand that Judge Carter signed an order to show cause?

MR. MILLER: Yes, sir.

THE COURT: Let us hear you. Go ahead.

MR. MILLER: Well, I have submitted a memorandum to show cause -- an order to show cause and a memorandum in support thereof.

In summary, my basic position is that under the circumstances if I don't get some form of injunctive relief the effect will be that I will not be in a position to see the ultimate outcome of this case.

To recite the facts in some detail: On September 9 I was fired by AT&T. I was given three weeks to find another job. Their basis for firing me was attitude and performance.

Now, I question that completely. My argument, my position, is that based upon my experiences in the previous eight months of working for AT&T, I was fired for racial discrimination and retaliation because of my complaints and my raising of questions as to the nature of my job.

To go back a little further now, back to

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when I first came to AT&T, which was January 12, 1976,
there were certain representations made to me: that I
would be a tax attorney in the controller's department;
that I would have responsibility in three areas:
investment credit, depreciation, and cost accounting.

They named a salary figure of \$28,000 a
year and they also named an annual increment of \$3,000 a
year.

The reality was, the only thing -- and this
is laid out in the papers I have submitted to this court --
the only thing that was true was the salary figure.

Now, after being there for four months,
making ^{the} decision to stay there ^Q first of all, on a personal
basis, because of embarrassment ^{over} of the fact that I had
made a mistake in coming to AT&T. And for purpose of
clarification: I had two other employment opportunities,
one with American Express, the other one with the NAACP
Legal Defense Fund.

What I discovered was that the specific --
well, I made a decision to stay there after
I noted the number of discrepancies between the nature
of the job itself and what I had previously been told.

I raised the question for the first time as
to the nature of my job situation when another, quote, tax

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1 attorney came onto the controller's department, and that
2 person was a Miss Barbara Josefowicz. I saw on my
3 previous superior's desk, immediate superior, a statement
4 describing Mrs. or Ms. Josefowicz's duties. She had
5 investment credit and she had depreciation specifically
6 described as her job responsibilities.
7

8 At this point, in my own words, that was
9 the ^{camel} ~~straw~~ that broke the camel's back. There was no purpose
10 whatsoever for me to remain quiet or to deal with the job
11 situation as it was. I spoke to my boss.

12 Now, this will cover a couple of points.
13 First of all, it explains the circumstances under which I
14 ~~have~~ initially raised the question as to my job situation
15 and also goes to the defendant's position as to the reason
16 ~~for my being fired~~ ^{why I was} ~~being~~ ^{was accused} attitude and performance. ^{my boss}

17 Immediately prior to telling Mr. Aya that
18 I wanted to discuss my job situation, he said he had no
19 problems whatsoever with the work I had produced so far
20 ^{to date} today, and his own words were that my work was A-1. And
21 previously he had described my first assignment with
22 AT&T, in his own words, according to him as one of the
23 finest analyses he says he had ever read. And that is
24 simply for purposes of responding to the defendant's
25 position that it was performance and attitude that was the

2 reason for my being fired.

3 I think, with that background, to come back
4 to this situation at this point: When I was fired I had two
5 options: One, since I have a license to practice, ^{law} of
6 going into private practice; or the other, I had the option
7 of seeking other employment. Well, I tried the second
8 option, because there is less risk in that, financial risk.

9 I had an interview with Bristol Myers, and
10 the person that I was interviewing with, Mr. James Gord,
11 international tax counsel for Bristol Myers, had a
12 pension, profit-sharing background with a law firm for
13 five years. ~~He said, however, well,~~ he was very interested
14 until he asked for references from AT&T. I said, "Well,
15 I would hope you wouldn't look to AT&T, because I am
16 having problems with AT&T." I didn't want to disclose
17 my situation. I thought that would have an adverse effect
18 on my job opportunities at Bristol Myers. I had to,
19 however, because they just insisted that I give them the
20 information. And I just told them. At that point interest
21 just dropped, dropped completely.

22 They subsequently hired -- well, it didn't
23 drop completely. They said that myself and another
24 applicant were in serious consideration. It turned out
25 that they hired a white female attorney from a law firm,

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2 and this person, they said, was heavier in international
3 tax background.

4 Well, at one point in time my lack of
5 international tax background was not so significant, but
6 subsequent to information as to the situation with AT&T
7 it became a significant factor.

8 The point of all that is that being fired
9 from a company like AT&T under circumstances of racial
10 discrimination, in a situation where many companies are
11 facing the same problem of possible potential discrimination
12 lawsuits, it makes it almost a joke to go and look
13 for a job. It's almost a joke under those circumstances.

14 So the fact of my being fired on the question--
15 I noticed, I read very briefly defendant's opposition
16 papers to this motion, in saying that there is no
17 irreparable injury. What I say is, this goes to the very
18 question: ^{the} circumstances of my being fired by AT&T just
19 effectively as a practical matter precludes ^{my} opportunity
20 with another employer.

21 Given that situation, I tried the next
22 alternative: private practice.

23 Now, it has cost me between eight and twelve
24 thousand dollars. I wasn't exactly broke at the time I
25 was fired, so I took that opportunity, plus I had certain

1 amount of credit *y* that is thoroughly exhausted at this
2 point. I think that I have made a valiant attempt over
3 five months in private practice, it is something that can
4 break open at any time, but there are great risks that are
5 involved. It is not an alternative that I would have
6 chosen at any point, but this wasn't a choice that I made
7 at this point in time -- which goes to, I guess, another
8 reason that they are giving for denying this motion, namely,
9 the fact that if you are seeking anything in the way of
10 monetary damages, then there is no irreparable injury,
11 and so your basis for injunctive relief is not there, you don't
12 have a basis for injunctive relief.
13

14 Based upon my research, I have come across a
15 few cases which do not address themselves specifically,
16 but which would be authority for the opposite position.
17 One case is the Hawaiian Telephone Company case -- bear
18 with me a couple of seconds until I find the page.

19 THE COURT: Surely.

20 MR. MILLER: There are a couple of cases on
21 point.

22 In the Hawaiian Telephone Company case, which
23 was decided in 1974 by the District Court in Hawaii, the
24 telephone company in Hawaii made the argument that they
25 would suffer irreparable injury if they were to pay into

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2 the State Unemployment Insurance Fund eight hundred and
3 ninety thousand dollars on the basis that the State
4 Unemployment Insurance Fund did not give interest. And so
5 they would be irreparably injured in the amount ^{lost interest on} of \$890,000.
6 The Court on that basis said that the injunctive relief
7 was proper. That is one example.

8 Another case is an employment case that involves
9 a basketball player, Rick Barry. That is a 1969 case in
10 District Court in California, where --

11 THE COURT: Do you have the citations for these
12 cases?

13 MR. MILLER: Yes, I do. In the memorandum of
14 law I submitted.

15 THE COURT: It is coming down from Judge Carter.
16 Go ahead.

17 MR. MILLER: I can give you my copy as soon as
18 I am finished.

19 THE COURT: All right.

20 MR. MILLER: In that case -- actually, what I
21 have just cited is that going to what status quo means,
22 which is the last peaceable uncontested status between
23 the parties which preceded the present controversy.

24 As I recollect the facts in that case, Rick
25 Barry wanted to jump from one basketball team to another

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2 basketball team. And his employers felt that he was
3 such an important asset and they made the argument to the
4 judge that he was such an important asset that Rick Barry
5 was unable to jump from one team to the other team.

6 First, the reason for citing this case is that,
7 first of all, it is an employment case, Rick Barry was
8 an employee; and secondly, I think that really, when you
9 get right down to it, it is a question of money. If they
10 could find somebody else -- they had him under contract.
11 He was leaving because he was going to get more money
12 somewhere else. I think that the reality, when you get
13 down to this whole issue of what constitutes irreparable
14 injury, is really the seriousness, how serious is the
15 financial damage to you. It is not that because money is
16 involved that you are not entitled to injunctive relief.
17 It is how serious is the injury to the person or from any
18 other standpoint.

19 In another case, Union Management Corporation
20 case, which was a Second Circuit 1966 case, a group of
21 people bought another corporation, and they entered into
22 a management contract, which is an employment contract,
23 with the previous owners for them to run the company.
24 The company from the viewpoint of the new owners was not
25 being run to their satisfaction. They went into court.

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They felt that they did not really know what the financial situation of the company and other administrative aspects of the company were, what was actually taking place.

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They sought an injunction to in effect alter the management contract so that they had day-to-day control over the business.

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The significance of that is, once again, it is an employment contract situation, it is an employment situation, and the injunctive relief was granted. The nature of the injunctive relief that was granted was to alter the terms of the contract as it was previously written, to the situation that the Court felt was best for the parties at that particular time.

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THE COURT: I think I got the drift of it. We don't have that yet, but I will read it, don't worry about it. Do you want to be heard, sir?

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MR.SCHEIER: Good morning, your Honor. My name is Sol Scheier. I represent the defendants in this action. I won't repeat what I have already said in my papers, which I am sure you have read already.

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THE COURT: I just have. Go ahead.

MR.SCHEIER: Just a few brief points. The first point is, I guess, although we don't mention it in our papers and although I recognize that this Court has broad

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2 injunctive powers, the nature of the relief requested in
3 this case is, to say the least, somewhat outlandish. I
4 have never heard of a case where a Court has compeled a
5 corporation or an individual to execute or compel a
6 retainer agreement for legal services or to require a
7 party to transfer somebody to another position which he had
8 never held and which would not be in any way preserving
9 the status quo, which presumably the function of a
10 preliminary injunction is.

11 Two. I think, notwithstanding my adversary's
12 position, that the law regarding the issuance of
13 preliminary injunctions has not changed in recent years,
14 and I think the basic principles are clear, in that there
15 has to be a showing of both irreparable injury and a
16 reasonable probability of success. In this case I think
17 neither of these factors is present.

18 There is a motion, which you may or may not be
19 aware of, which the defendants have made to dismiss the
20 action for failure to state a claim for relief of which
21 this Court may take cognizance. My papers should be before
22 you. The motion is returnable next week. I am sure you
23 will have an opportunity to read it before you sign this,
24 and I won't repeat what I have said in that motion. I just
25 would point out, though, that what the plaintiff has said

1 here this morning in a sense reinforces the position we
2 have taken in that motion, in that this is basically a
3 claim, as he puts it, to recover because he claims that
4 the defendant misrepresented the nature of the position
5 for which he was taken. He calls it fraud and deceit and
6 so forth. But the fact is that, if anything, this is not
7 a claim that is cognizable by this Court. He uses the
8 euphemism repeatedly discrimination. But when you read
9 his complaint and you analyze the facts that he asserts
10 in support of the complaint, it appears that this is not
11 racial discrimination. His complaint is that he took a
12 job which he did not like, with a job content which he
13 felt was misrepresented to him at the time that he took
14 the job, and that this job did not have the appropriate
15 status and privileges which he felt he was entitled to as
16 an attorney and which he felt were inferior to those of
17 attorneys in the legal department. The plaintiff in this
18 case was not employed in the legal department of AT&T;
19 he was employed in the controller's office as a tax
20 researcher.
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22 Those facts are elaborated to some extent in my
23 affirmation in support of our motion to dismiss, and I
24 won't repeat them at length here.

25 The one final point I wish to make is with

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2 respect to the plaintiff's assertion that a reasonable
3 probability of success need not be shown in a motion for
4 a preliminary injunction. And he cites a case, Jacobson v.
5 Armstrong, which is a case coming out of this Circuit,
6 a well-known case in the field of antitrust. Contrary to
7 the principle of law that plaintiff asserts the case
8 stands for, it stands for quite the opposite. It stands
9 for the position that a clear showing of probability of
10 success must be made out in order to entitle a party seeking
11 preliminary injunctive relief. Beyond that, I think the
12 cases are clear, the principles are clear.

13 In this case the plaintiff was dismissed three
14 months before he even commenced this action. There is no
15 question of restoring or preserving the status quo.
16 Whatever monetary damages the plaintiff would sustain as
17 a result of his dismissal, assuming that he makes out a
18 case, that it is based upon some legally redressable
19 wrong in this court, assuming that that would be so,
20 obviously he can be compensated fully in the form of
21 monetary damages.

22 Moreover, it seems to me that, on balance, when
23 you compare the damage that would be sustained by the
24 plaintiff, which can be compensated by a precise sum, as
25 compared to compelling the defendant to retain in its

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employ one who it no longer has any need for, it seems to me that the equities are quite obvious, and there is no basis for injunctive relief in this case.

THE COURT: I will reserve decision. At least I would like to take a look at all the papers. That is only fair.

MR. MILLER: Your Honor, may I have an opportunity to respond in some part?

THE COURT: I am sorry, sir. I have a hearing defect. I don't hear you when you sit down.

MR. MILLER: May I have an opportunity to respond to what was previously stated by defendant?

THE COURT: You mean right now?

MR. MILLER: Yes.

THE COURT: Go ahead.

MR. MILLER: I think once again they are saying that the nature of the relief that I am requesting is on its face unheard of, ridiculous, and so forth, with respect to injunction to transfer an employee to a position which the employee never held or with respect to the question of contract for a legal retainer with a prior employee or anyone who was previously fired.

The nature of the relief that I requested was based upon the nature of the circumstances that I was

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2 faced with as a result of what they had done. I think
3 that they are raising legal arguments when they say that
4 this is merely a breach of contract situation. There is
5 sufficient legal authority to dispute and question the
6 position that the defendants are taking before this Court.

7 They have characterized the statements made
8 and the facts alleged in my complaint in a way of course
9 beneficial to their position. I completely disagree.

10 THE COURT: That is what advocacy is for.

11 MR. MILLER: I completely disagree, of course.
12 And I appreciate the opportunity of making that statement
13 here at this point.

14 The idea of preserving the status quo -- well,
15 I was forced into a position of going into private
16 practice, because I couldn't find another job. Given the
17 situation here, I think it is just a matter of logical
18 alternatives. If the situation is such that my financial
19 resources are depleted because of the illegality of the
20 plaintiff and I may not be around for three or four or five
21 years when this case finally gets resolved, it seems to me
22 that you just simply look to what the fair alternatives are.
23 It is either a question of reinstatement or it is a question
24 of a contracting for legal services. The question is now,
25 when they are saying that it is a breach of contract, a

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2 misrepresentation situation, not a discrimination case,
3 the fact is, as I discovered subsequent to my coming to
4 AT&T, AT&T was under a consent decree, they were under
5 an obligation to provide blacks and other minorities jobs.
6 They were putting me in a position which was satisfying
7 and fulfilling their quota.

8 Looking back, it is just a matter of what they
9 felt I would find acceptable in terms of verbal statements
10 as to the nature of the job.

11 I don't think it is fair to say that an employee,
12 a potential employee, has any other basis for determining
13 the truth or falsity of the representations made by a
14 potential employer as to the nature of the job he will or
15 will not be taking, but based on anything more than good
16 faith. If somebody makes a representation, you either
17 can believe it or disbelieve it. If the person looks
18 honest and reliable and the job sounds good, there is
19 really no other basis for taking the job than that.

20 Finally, with respect to the Jacobson case, I
21 think if the Court reads the case the Court will see that
22 what was recently said was just not so.

23 THE COURT: All right. I want to see all the
24 papers, though. I will reserve decision.

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